

CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
Bureau of Customs and Border Protection
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade***

VOL. 38

DECEMBER 1, 2004

NO. 49

This issue contains:

Bureau of Customs and Border Protection

General Notices

U.S. Court of International Trade

Slip Op. 04-139

Slip Op. 04-141 Through 04-145

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Web at: <http://www.cbp.gov>**

Bureau of Customs and Border Protection

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 10 2004)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: Presented herein are the copyrights, trademarks, and trade names recorded with U.S. Customs and Border Protection during the month of October 2004. The last notice was published in the CUSTOMS BULLETIN on October 13, 2004.

Corrections or updates may be sent to: Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572-8710.

Dated: November 10, 2004

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

11/01/2004
13:17:35

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN OCTOBER 2004

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TMH OR MSK	OWNER NAME	PAGE DETAIL	RES
COP0400120	2004/1004	2024/1004	ROYALTY FLORAL	DML HOLDINGS, INC.		N
COP0400121	2004/1004	2024/1004	MONTERREY MANTLE DESIGN (1996)	DISTINCTIVE MANTLE DESIGNS, INC.		N
COP0400122	2004/1004	2024/1004	FINDING NEMO - SPRING 2003 STYLE GUIDE	DISNEY ENTERPRISES, INC. & PIXAR		N
COP0400123	2004/1004	2024/1004	TAMAGOTCHI PLUS ANIME IMAGES	KABUSHI KAISHA BANDAI		N
COP0400124	2004/1004	2024/1004	TAMAGOTCHI PLUS PIXEL IMAGES	KABUSHI KAISHA BANDAI		N
COP0400125	2004/1004	2024/1004	TAMAGOTCHI PLUS PIXEL ICONS	KABUSHI KAISHA BANDAI		N
COP0400126	2004/1004	2024/1004	STYLE 1017	KREITMAN KNOTWORKS, INC.		N
COP0400127	2004/1004	2024/1004	HE AIN'T HEAVY	KREITMAN KNOTWORKS, INC.		N
COP0400128	2004/1004	2024/1004	SHE AIN'T HEAVY	WALT HORTON STUDIOS, INC.		N
COP0400129	2004/1004	2024/1004	OPTIC DESIGNS COLLECTION	WALT HORTON STUDIOS, INC.		N
COP0400130	2004/1004	2024/1004	DICE EPISODE 1 (ENGLISH)	CHARLES M. OPHEIM		N
COP0400131	2004/1028	2024/1028	VINTAGE COSMETICS DESIGN 1994 SERIES 1 (4 DESIGNS)	BANDAI ENTERTAINMENT INC. VINTAGE GROUP INC.		N
SUBTOTAL RECORDATION TYPE 12						
TMK0400903	2004/1004	2006/1203	NULYTELY	BRAINTREE LABORATORIES, INC.		N
TMK0400904	2004/1004	2006/0318	GOLYTELY	BRAINTREE LABORATORIES, INC.		N
TMK0400905	2004/1004	2012/0925	WAKELYTELY	BRAINTREE LABORATORIES, INC.		N
TMK0400906	2004/1004	2012/0925	WAKELYTELY	BRAINTREE LABORATORIES, INC.		N
TMK0400907	2004/1004	2013/1021	BANANA PEEL	WAKELYTELY, INC.		N
TMK0400908	2004/1004	2005/1128	BRILLIANCE	BELDEN TECHNOLOGIES, INC.		N
TMK0400909	2004/1004	2008/0127	BRILLIANCE VIDEOFLEX	BELDEN TECHNOLOGIES, INC.		N
TMK0400910	2004/1004	2008/0915	DATATUFF	BELDEN TECHNOLOGIES, INC.		N
TMK0400911	2004/1004	2010/0717	FLAMAREST	BELDEN TECHNOLOGIES, INC.		N
TMK0400912	2004/1004	2010/0717	FLAMAREST	BELDEN TECHNOLOGIES, INC.		N
TMK0400913	2004/1004	2011/1166	PHAT HYDRO	BELDEN TECHNOLOGIES, INC.		N
TMK0400914	2004/1004	2014/0309	PANH-U	TOWNSLEY EVAN D.		N
TMK0400915	2004/1004	2014/0201	METALLICA	FEUDENBERG NONMOVENS LIMITED		N
TMK0400916	2004/1004	2014/0217	PURE FIJI	PURE FIJI EXPORT LTD.		N
TMK0400917	2004/1004	2013/0902	CHARLES CHAPIN & DESIGN	BUBBLES INCORPORATED	FJ	N
TMK0400918	2004/1004	2008/0127	CHAPIN & DESIGN	BUBBLES INCORPORATED		N
TMK0400919	2004/1004	2008/0127	CHAPIN & DESIGN	BUBBLES INCORPORATED		N
TMK0400920	2004/1004	2014/0420	TERATEXT	IMPLET PRODUCTIONS		N
TMK0400921	2004/1004	2010/0829	VON DUTCH	SCIENCE APPLICATIONS INT'L CORP.		N
TMK0400922	2004/1004	2007/1223	DESIGN ONLY	VON DUTCH ORIGINALS, LLC		N
TMK0400923	2004/1004	2013/0128	HECHO AL ESTILO RANCHO	CASTRO CHEESE COMPANY, INC.		N
TMK0400924	2004/1004	2008/0507	LA VAGUITA" & DESIGN	CASTRO CHEESE COMPANY, INC.		N
TMK0400925	2004/1004	2008/0507	LA VAGUITA" & DESIGN	CASTRO CHEESE COMPANY, INC.		N
TMK0400926	2004/1004	2012/0723	DREAMWORKS & DESIGN	CASTRO CHEESE COMPANY, INC.		N
TMK0400927	2004/1004	2012/0326	SHREK	DREAMWORKS L.L.C.		N
TMK0400928	2004/1004	2014/0225	RALPH LAUREN BLUE	PRL USA HOLDINGS, INC.		N
TMK0400929	2004/1005	2007/1125	XTRME	THE GATES CORPORATION		N
TMK0400930	2004/1005	2014/0210	NARCISO RODRIGUEZ	NARCISO RODRIGUEZ		N
TMK0400931	2004/1005	2014/0210	NARCISO RODRIGUEZ	NARCISO RODRIGUEZ		N
TMK0400932	2004/1005	2014/0901	MONTBLANC	MONTBLANC-STMPLO G.M.B.H.		N
TMK0400933	2004/1005	2013/1021	OLD WEST	JAMA CORPORATION PVT. LTD.		N
TMK0400934	2004/1005	2014/0606	MINX	APOLO TEXTILE, S.A. DE C.V.		N
TMK0400935	2004/1005	2011/1218	ZIK-ZOK	EXOTIC PARADISE CORPORATION		N
TMK0400936	2004/1005	2014/0803	NEW YORK FANGETTABOUDIT	SCHLAGE LOCK COMPANY		N

Annual User Fee for Customs Broker Permit and National Permit:
General Notice

AGENCY: U.S. Customs and Border Protection, Department of
Homeland Security

ACTION: Notice of due date for Customs broker user fee

SUMMARY: This is to advise Customs brokers that the annual fee of \$125 that is assessed for each permit held by a broker whether it may be an individual, partnership, association or corporation, is due by January 21, 2005. This announcement is being published to comply with the Tax Reform Act of 1986.

DATES: Due date for payment of fee: January 21, 2005.

FOR FURTHER INFORMATION CONTACT: Bruce Raine, Broker Management Branch, (202)344-2580.

SUPPLEMENTARY INFORMATION: Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub.L. 99-272) established that an annual user fee of \$125 is to be assessed for each Customs broker permit and National permit held by an individual, partnership, association or corporation. This fee is set forth in the Customs Regulations in section 111.96 (19 CFR 111.96).

Customs Regulations provide that this fee is payable for each calendar year in each broker district where the broker was issued a permit to do business by the due date which will be published in the Federal Register annually. Broker districts are defined in the General Notice published in the Federal Register, Volume 60, No. 187, September 27, 1995.

Section 1893 of the Tax reform Act of 1986 (Pub.L. 99-514) provides that notices of the date on which the payment is due for each broker permit shall be published by the Secretary of the Treasury in the Federal Register by no later than 60 days before such due date.

This document notifies brokers that for 2005, the due date of the user fee is January 21, 2005. It is expected that the annual user fees for brokers for subsequent years will be due on or about the twentieth of January of each year.

DATED: November 9, 2004

JAYSON P. AHERN,
*Assistant Commissioner,
Office of Field Operations.*

[Published in the Federal Register, November 19, 2004 (69 FR 67749)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.

Washington, DC, November 17, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
*Assistant Commissioner,
Office of Regulations and Rulings.*

PROPOSED REVOCATION OF A RULING LETTER
AND REVOCATION OF TREATMENT RELATING
TO TARIFF CLASSIFICATION OF A CERTAIN MEN'S
UPPER BODY GARMENTS

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of certain men's upper body garments.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) intends to revoke one ruling letter relating to the tariff classification of certain men's upper body garments under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP also proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before December 31, 2004.

ADDRESS: Written comments are to be addressed to Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be reviewed at Customs and Border Protection, 799 9th Street N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Textiles Branch at (202) 572-8713 or Cynthia Reese, Textiles Branch at (202) 572-8812.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter pertaining to the tariff classification of certain men's upper body garments. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) K84208, dated March 18, 2004, (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise or the importer's or

CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY K84208, dated March 18, 2004, CBP ruled that a men's upper body garment was classified in heading 6205, HTSUSA, as a men's man-made fiber shirt. Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error. We have determined that the article is properly classified in heading 6201, HTSUSA, as a garment similar to a windbreaker.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY K84208 and to revoke or modify any other ruling not specifically identified, to reflect the proper classification of certain men's upper body garments according to the analysis contained in proposed HQ 967188, set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

DATED: November 12, 2004

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,NY K84208
March 18, 2004
CLA-2-62:RR:NC:WA:355 K84208
CATEGORY: Classification
TARIFF NO.: 6205.30.2070MR. DANIEL J. NOLAN
KUEHNE & NAGEL, INC.
1261 Aviation Blvd., Suite 190
Hebron, KY 41048

RE: The tariff classification of a man's shirt from Sri Lanka

DEAR MR. NOLAN:

In your letter dated March 9, 2004, you requested a classification ruling on behalf of Holloway Sportswear, Inc.

You submitted a sample of a men's upper body garment which you identified as a short sleeved pullover jacket, style 9058. The pull over garment, made of 100% woven nylon fabric, features short sleeves; a short stand up collar; a partial front opening beginning at the neck and extending down for approximately five inches and which is secured shut with a zipper; a tunneled hemmed bottom with an elasticized drawcord threaded through it; and a six inch long side vent with a zipper for closure.

The applicable subheading for style 9058 will be 6205.30.2070, Harmonized Tariff Schedule of the United States (HTS), which provides for men's or boys' shirts: Of man-made fibers: Other: Other: Other: Men's. The duty rate will be 29.1¢/kg. plus 25.9% ad valorem.

Style 9058 falls within textile category designation 640. Based upon international textile trade agreements products of Sri Lanka are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the Textile Status Report for Absolute Quotas, which is available at our Web site at www.cbp.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Camille R. Ferraro at 646-733-3046.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967188
CLA-2 RR:CR:TE 967188 KSH
TARIFF NO.: 6201.93.3511

MARK R. SANDSTROM, ESQ.
1400 16th Street N.W. Suite 400
Washington, D.C. 20036

RE: Revocation of New York Ruling Letter (NY) K84208, dated March 18, 2004; Classification of certain men's upper body garments.

DEAR MR. SANDSTROM:

This is in response to your letter of July 19, 2004, on behalf of your client, Holloway Sportswear, Inc., in which you request reconsideration of New York Ruling Letter (NY) K84208, issued to your client on March 18, 2004, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain men's upper body garments. The men's upper body garments were classified in subheading 6205.30.2070, HTSUS, which provides for "Men's or boys' shirts: Of man-made fibers: Other: Other: Other: Men's." You assert that based on the appearance and characteristics of the men's upper body garments, they are classified in subheading 6201.93.3000, HTSUS, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Water resistant." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error.

FACTS:

The submitted sample is a men's upper body garment which you have identified as a short sleeve pullover jacket, style 9058. It is made of 100% woven nylon fabric, features short sleeves, a short stand up collar, a partial front opening beginning at the neck and extending down for approximately five inches which is secured shut with a zipper, a tunneled hemmed bottom with an elasticized drawcord threaded through it, and a six inch long side vent with a zipper closure on the left side.

ISSUE:

Whether the Style 9058 is classifiable as men's shirts in heading 6205, HTSUS, or as men's windbreakers under heading 6201, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN),

constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

In K84208, it was determined that the upper body garment was not classifiable as an outerwear jacket under heading 6201, HTSUS, because the garment does not possess sufficient jacket features. In making the distinction between a shirt classifiable under heading 6205, HTSUS, and a jacket under heading 6201, HTSUS, CBP applies The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories, CIE 13/88, ("Guidelines"). These Guidelines set forth eleven criteria typically found on outerwear coats/jackets and further note that "Garments not possessing at least three of the listed features will be considered on an individual basis."

In circumstances such as these, where the identity of a garment is ambiguous for classification purposes, reference to the Guidelines is appropriate. The Guidelines were developed and revised in accordance with the HTSUS to ensure uniformity, to facilitate statistical classification, and to assist in the determination of the appropriate textile categories established for the administration of the Arrangement Regarding International Trade in Textiles. The Guidelines offer the following with regard to the classification of men's or boy's shirt-jackets:

Three-quarter length or longer garments commonly known as coats, and other garments such as . . . waist length jackets fall within this category . . . A coat is an outerwear garment which covers either the upper part of the body or both the upper and lower parts of the body. It is normally worn over another garment, the presence of which is sufficient for the wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both. . . .

* * *

C) Shirt-jackets have full or partial front openings and sleeves, and at the least cover the upper body from the neck area to the waist. . . . The following criteria may be used in determining whether a shirt-jacket is designed for use over another garment, the presence of which is sufficient for its wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both:

- (1) Fabric weight equal to or exceeding 10 ounces per square yard. . . .
- (2) A full or partial lining.
- (3) Pockets at or below the waist.
- (4) Back vents or pleats. Also side vents in combination with back seams.
- (5) Eisenhower styling.
- (6) A belt or simulated belt or elasticized waist on hip length or longer shirt-jackets.
- (7) Large jacket/coat style buttons, toggles or snaps, a heavy-duty zipper or other heavy-duty closure, or buttons fastened with reinforcing thread for heavy-duty use.
- (8) Lapels.
- (9) Long sleeves without cuffs.

- (10) Elasticized or rib-knit cuffs.
- (11) Drawstring, elastic or rib-knit waistband.

* * *

Garments having features of both jackets and shirts will be categorized as coats if they possess at least three of the above listed features and if the result is not unreasonable . . . Garments not possessing at least three of the listed features will be considered on an individual basis.

See Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories, CIE 13/88 at 5-6 (Nov. 23, 1988) and the CBP Informed Compliance Publication (ICP) What Every Member of the Community Should Know About: Apparel Terminology Under the HTSUS, (Jan., 2004).

CBP recognizes that the garment at issue is a hybrid garment, possessing features of both shirts and jackets. A physical examination of the garment at issue reveals that it possesses one of the Guidelines jacket criteria: the garment has a drawstring waistband. The garment therefore must be considered on an individual basis.

The ENs for heading 6205 state in pertinent part:

The heading **does not cover** garments having the character of wind-cheaters, wind jackets, etc. of **heading 62.01**, which generally have a tightening at the bottom, or of jackets of **heading 62.03**, which generally have pockets below the waist. Sleeveless garments are also **excluded**.

The subject merchandise has tightening at the bottom and is constructed of woven nylon fabric typically used in windbreakers. These features and the oversized cut cause the garment to have the character of a wind-jacket. The subject merchandise is therefore precluded from classification as a shirt of heading 6205, HTSUS, pursuant to the EN.

The next issue is whether the garment at issue is classifiable as a wind-breaker or similar article of heading 6201, HTSUS. The Explanatory Notes (EN) to heading 6101, which apply *mutatis mutandis* to the articles of heading 6201, HTSUS, state: "This heading covers . . . garments for men or boys, characterised by the fact that they are generally worn over all other clothing for protection against the weather." The upper body garment is constructed from woven nylon which is typically used in windbreakers. The fabric used in the construction of the subject merchandise will provide a degree of protection against the weather due to the overall styling including a zipper that allows the stand-up collar to be zipped closed and woven nylon fabric. Although the subject garment possesses short sleeves, the merchandise is similar to garments which have been classified as wind breakers or wind cheaters and which are typically worn by golfers. The shorter sleeves of this particular garment may be preferable to some golfers who want more flexibility in their swing and do not want to be hampered by long sleeves. The subject garment is much like the jackets worn by golfers or other athletes for warmth or for protection from light rain. Indeed the hang tag attached to the sample indicates that it is both wind and water resistant.

The hang tag also markets the upper body garment as a jacket and indicates that it has generous sizing. A review of various internet retailer sites

indicates that the subject garment is marketed and sold as a pullover jacket. A catalog description of the subject garment advertises it as a warmup garment with coordinating pants.

The side vent further allows the upper body garment to be worn over other upper body garments. Accordingly, the merchandise is classifiable as an article similar to a men's windbreaker under heading 6201, HTSUS.

You claim that the subject merchandise is water resistant but have not submitted any information which validates such claim. The Additional U.S. Note to Chapter 62 addresses the term "water resistant" and states in pertinent part:

For the purposes of [subheading 6201.93.30], the term "water resistant" means that garments classifiable in those subheadings must have a water resistance (see ASTM designations D 3600-81 and D 3781-79) such that, under a head pressure of 600 millimeters, not more than 1.0 gram of water penetrates after two minutes when tested in accordance with AATCC Test Method 35-1985. This water resistance must be the result of a rubber or plastics application to the outer shell, lining, or inner lining.

The port of entry may perform such test for water resistant determinations and if the subject merchandise meets the aforementioned standards of U.S. Additional Note, Chapter 62, HTSUSA, the subject merchandise will be classified in subheading 6201.93.30, HTSUS.

HOLDING:

NY K84208, dated March 18, 2004, is hereby revoked.

If the men's upper body garment, style 9058, passes the water resistance test specified in Chapter 62, U.S. Note 2, HTSUS, then the applicable HTS subheading for the garment will be 6201.93.3000, HTSUS, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers, and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Water resistant." The duty rate will be 7.1 percent *ad valorem*.

If the men's upper body garment, style 9058, does not pass the water resistance test specified in Chapter 62, U.S. Note 2, HTSUS, then the applicable HTS subheading for the garment will be 6201.93.3511, HTSUS, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers, and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Men's." The applicable rate of duty is 27.7 percent *ad valorem*. The textile quota category is 634.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest your client check, close to the time of shipment, the Textile Status Report for Absolute Quotas, available on the CBP website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

**PROPOSED REVOCATION AND MODIFICATION OF
RULING LETTERS AND REVOCATION OF TREATMENT
RELATING TO TARIFF CLASSIFICATION OF CERTAIN
EXTRUDED POLYETHYLENE OR POLYPROPYLENE MESH**

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed revocation and modification of tariff classification ruling letters and revocation of treatment relating to the classification of certain extruded polyethylene or polypropylene mesh.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), this notice advises interested parties that Customs and Border Protection (CBP) intends to revoke three ruling letters and modify one ruling letter, each relating to the tariff classification of extruded polyethylene or polypropylene mesh under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP also proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before December 31, 2004.

ADDRESS: Written comments are to be addressed to Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be reviewed at Customs and Border Protection, 799 9th Street N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Textiles Branch at (202) 572-8713 or Cynthia Reese, Textiles Branch at (202) 572-8812.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke three ruling letters and modify one ruling letter, each pertaining to the tariff classification of extruded polyethylene or polypropylene mesh. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letters (NY) C84049, dated February 13, 1998 (Attachment A), NY G87431, dated March 20, 2001 (Attachment B), NY D80028, dated July 28, 1998 (Attachment C) and to the modification of NY H88635, dated February 21, 2002 (Attachment D), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved

in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY C84049, CBP ruled that extruded polyethylene mesh was classified in subheading 3920.10.0000, HTSUSA, which provides for "other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene." In NY G87431, CBP ruled that extruded polyethylene plastic was also classified in subheading 3920.10.0000, HTSUSA. Since the issuance of those rulings, CBP has reviewed the classification of these items and has determined that the cited rulings are in error. We have determined that the articles are properly classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other."

In NY H88635, CBP classified 100% polyethylene open-work warp knit fabric and extruded polyethylene mesh. CBP ruled that the extruded polyethylene mesh was classified in subheading 3920.10.0000, HTSUSA. With respect to the extruded polyethylene mesh, CBP has determined that it is properly classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other."

In NY D80028, CBP ruled that extruded polypropylene mesh was classified in subheading 3920.20.0000, HTSUSA, which provides for "other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of polypropylene." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error. We have determined that the article is properly classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY C84049, NY G87431, NY D80029 and modify NY H88635 and to revoke or modify any other ruling not specifically identified, to reflect the proper classification of extruded polyethylene or polypropylene mesh according to the analysis contained in proposed Headquarters Ruling Letters (HQ) 967346, HQ 967347, HQ 967348 and HQ 967349 as set forth as Attachments E through H, respectively, to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

DATED: November 12, 2004

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY C84049
February 13, 1998
CLA-2-39:RR:NC:SP:221 C84049
CATEGORY: Classification
TARIFF NO.: 3920.10.0000

Ms. LORI ALDINGER
RITE AID CORPORATION
P.O. Box 3165
Harrisburg, PA 17105

RE: The tariff classification of extruded polyethylene mesh from China.

DEAR MS. ALDINGER:

In your letter dated January 27, 1998, you requested a tariff classification ruling.

The product consists of a sheet of extruded polyethylene mesh measuring 60 inches by 40 inches. The mesh is made in a continuous extrusion process and not from pre-existing filaments. The mesh is intended to be used to package an Easter Basket.

You have asked whether the above-described items are classifiable in Chapter 95 as festive articles based upon the impact of a recently decided court case initiated by Midwest of Cannon Falls (No. 96-1271, -1279 dated Aug. 14, 1997). The outcome of this case, however, is not applicable to the subject articles. Explanatory Note (B)(c) to heading 95.05, reads: This heading also excludes: Packagings of plastics or of paper, used during festivals (classified according to constituent material, for example, Chapter 39 or 48). The instant product falls within this exclusion.

The applicable subheading for the extruded polyethylene mesh will be 3920.10.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene. The rate of duty will be 4.2 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is im-

ported. If you have any questions regarding the ruling, contact National Import Specialist Joan Mazzola at 212-466-5580.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY G87431
March 20, 2001
CLA-2-39:RR:NC:SP:221 G87431
CATEGORY: Classification
TARIFF NO.: 3920.10.0000

MR. STEPHEN L. FODOR
KUEHNE & NAGEL, INC.
235 Southfield Parkway
Forest Park, GA 30297

RE: The tariff classification of garden netting from Spain.

DEAR MR. FODOR:

In your letter dated February 14, 2001, on behalf of Interma Nets S.A. you requested a tariff classification ruling.

A sample was provided with your letter. The garden netting is sheeting composed of extruded polyethylene plastic.

The applicable subheading for the garden netting will be 3920.10.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene. The rate of duty will be 4.2 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Joan Mazzola at 212-637-7034.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY D80028
July 28, 1998
CLA-2-39:RR:NC:SP:221 D80028
CATEGORY: Classification
TARIFF NO.: 3920.20.0000; 9817.00.5000

MR. CHRIS MURRAY
AMERICAN CARGO EXPRESS, INC.
NEWARK INTERNATIONAL AIRPORT/SEAPORT
435 Division Street
Elizabeth, NJ 07201

RE: The tariff classification of polypropylene mesh from China.

DEAR MR. MURRAY:

In your letter dated July 14, 1998, on behalf of Power Aisle, Inc., you requested a tariff classification ruling.

A sample was provided. The product consists of extruded polypropylene mesh made in a continuous extrusion process and not from pre-existing filaments.

This mesh can be placed over trees and plants to protect vegetables and fruits from birds. According to the brochure, the mesh will be sold in a package and measure 7 feet by 20 feet.

The applicable subheading for the polypropylene mesh will be 3920.20.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of polypropylene. The rate of duty will be 4.2 percent ad valorem.

Machinery, equipment and implements to be used for agricultural or horticultural purposes are provided for under the special classification provision of subheading 9817.00.5000, HTS.

Upon compliance with the actual use requirements of Section 10.131-139 of the Customs Regulations, the polypropylene mesh would be classifiable in subheading 9817.00.5000, HTS, and would be free of duty.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Joan Mazzola at 212-466-5580.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY H88635

February 21, 2002

CLA-2-60:RR:NC:TA:352 H88635

CATEGORY: Classification

TARIFF NO.: 3920.10.0000; 6005.31.0010

MR. JOHN MATTSON
NORTH STAR WORLD TRADE SERVICES, INC.
980 Lone Oak Road, Suite 160
Eagan, MN 55121

RE: The tariff classification of a 100% polyethylene open-work warp knit fabric and a polyethylene extruded mesh from China.

DEAR MR. MATTSON:

In your letter dated February 11, 2002, on behalf of your client Treessentials Company, you requested a tariff classification ruling.

Two samples accompanied your request for a ruling. The first, designated as "Black Extruded Netting", is a extruded polyethylene mesh. This product measures 14 feet in width and will be imported in 1000 foot lengths. It will weigh 2 to 5 pounds per 1000 square feet. Your correspondence indicates that this item will be used in the agricultural industry to protect grape crops from damage by birds.

The second product, designated by you as "White Knit Netting", is an open-work warp knit fabric composed of 100% polyethylene monofilaments. The monofilaments from which this product is knit meet the dimensional requirements to be considered textile monofilaments and consequently the fabric knit from these products are considered textile knit fabrics. This knit fabric will be imported in rolls of 1000 feet and measure approximately 427 centimeters in width. Your correspondence indicates that this item will also be used in the agricultural industry to protect grape crops from damage by birds.

The applicable subheading for the black extruded polyethylene mesh will be 3920.10.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other plates, sheets, film, foil or strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials, of polymers of ethylene. The rate of duty will be 4.2 percent ad valorem.

The applicable subheading for the white polyethylene open-work knit fabric will be 6005.31.0010, Harmonized Tariff Schedule of the United States (HTS), which provides for warp knit fabrics including those made on galloon knitting machines), other than those of headings 6001 to 6004, of synthetic fibers, unbleached or bleached, open-work fabrics. The rate of duty will be 10.8 percent ad valorem.

Machinery, equipment and implements to be used for agricultural or horticultural purposes are provided for under the special classification provision of subheading 9817.00.5000, HTS. Upon compliance with the actual use requirements of Section 10.131-139 of the Customs Regulations, the black

extruded polyethylene mesh would be classifiable in subheading 9817.00.5000, HTS, and would be free of duty.

U.S. Note 2 to Subchapter XVII of Chapter 98 states in part that Subheading 9817.00.50 and 9817.00.60 do not apply to articles of textile material. Since the white warp knit open-work fabric is considered a knit textile material, it is excluded from classification as machinery, equipment and implements to be used for agricultural or horticultural purposes in heading 9817.00.5000, HTS.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Alan Tytelman at 646-733-3045.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967346
CLA-2 RR:CR:TE 967346 KSH
TARIFF NO.: 3926.90.9880

MS. LORI ALDINGER
RITE AID CORPORATION
P.O. Box 3165
Harrisburg, PA 17105

RE: Revocation of New York Ruling Letter (NY) C84049, dated February 13, 1998; Classification of extruded polyethylene mesh.

DEAR MS. ALDINGER:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) C84049, issued to you on February 13, 1998, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of extruded polyethylene mesh. The article was classified in subheading 3920.10.0000, HTSUSA, which provides for "other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene." We have reviewed that ruling and found it to be in error. Therefore, this ruling revokes NY C84049.

FACTS:

The product consists of a sheet of extruded polyethylene mesh measuring 60 inches by 40 inches. The mesh is made in a continuous extrusion process

and not from pre-existing filaments. The mesh is to be used to package an Easter basket.

ISSUE:

Whether the extruded polyethylene mesh is classified in heading 3926, HTSUSA, or heading 3920, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 3920, HTSUSA, provides for "Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials."

Note 10 to Chapter 39, HTSUS, provides:

In headings 3920 and 3921, the expression "plates, sheets, film, foil and strip" applies only to plates, sheets, film, foil and strip (other than those of chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

The term "sheets" is not defined in the text of the HTSUSA or the Explanatory Notes. When terms are not so defined, they are construed in accordance with their common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

Webster's Third New International Dictionary (Webster's) (1986) defines "sheeting," in relevant part, as "1: material in the form of sheets or suitable for forming into sheets: as . . . b: material (as a plastic) in the form of a continuous film. . . ." *Id.* at 2092. Webster's defines "sheet," in relevant part, as "3 a: a broad stretch or surface of something that is usu. thin in comparison to its length and breadth. . . ." *Id.* at 2091. The *Oxford English Dictionary* (2d Ed. 1989) defines "sheet" as "9. a. A relatively thin piece of considerable breadth of a malleable, ductile, or pliable substance." *Id.* at 224.

The Court of International Trade has also examined the term sheet in various cases. In *3G Mermet Fabric Corp. v. United States*, 135 F. Supp. 2d 151 (2001), the Court defined "sheet" as a "material in the form of a continuous stem covering or coating."

In *Sarne Handbags Corp. v. United States*, 100 F. Supp. 2d 1126 (2000), the Court defined the term "sheeting" as follows:

[T]he common meaning of "sheeting" is material in the form of or suitable for forming into a broad surface of something that is unusually

thin, or is a material in the form of a continuous thin covering or coating.

In HQ 965889, dated March 17, 2003, geotextile material manufactured from woven mesh visibly coated on both sides with plastics was classified in heading 3926, HTSUSA. In so doing, we determined that the open spaces of the geotextile material were large enough that the material could not be considered to have a "broad surface." The unusually wide spacing in the weave interrupts any sort of surface continuity that could be formed, with each warp and weft yarn essentially standing alone, except where they intersect. The weave was not tight enough, and the yarns were not close enough, for them to form a continuous surface.

Similarly, the World Customs Organization's (WCO) Harmonized System Committee (HSC) classified substantially similar merchandise in subheading 3926.90, HTSUSA. See Annex L/5 to Doc. NC0590B2 (HSC/29/May 2002). The HSC did not consider the geotextile material, with its large open weave, to be a "sheet." See Annex G/11 to Doc. NC0510E2 (HSC/28/Nov. 2001).

The instant extruded polyethylene mesh, like the geotextile material of HQ 965889 and that classified by the HSC, has open spaces and cannot be considered to have a broad surface. Thus, the mesh lacks the continuity necessary to be classified as a sheet of plastics of heading 3920, HTSUSA. Accordingly, the extruded polyethylene mesh is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other."

HOLDING:

NY C84049, dated February 13, 1998, is hereby revoked.

The extruded polyethylene mesh is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other." The general column one rate of duty is 5.3% *ad valorem*.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967347
CLA-2 RR:CR:TE 967347 KSH
TARIFF NO.: 3926.90.9880

MR. STEPHEN L. FODOR
KUEHNE & NAGEL, INC.
235 Southfield Parkway
Forest Park, GA 30297

RE: Revocation of New York Ruling Letter (NY) G87431, dated March 20, 2001; Classification of extruded polyethylene plastic.

DEAR MR. FODOR:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) G87431, issued to you on behalf of your client Interma Nets S.A., on March 20, 2001, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of extruded polyethylene plastic. The article was classified in subheading 3920.10.0000, HTSUSA, which provides for "other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene." We have reviewed that ruling and found it to be in error. Therefore, this ruling revokes NY G87431.

FACTS:

The article identified as garden netting is sheeting composed of extruded polyethylene plastic.

ISSUE:

Whether the extruded polyethylene plastic is classified in heading 3926, HTSUSA, or heading 3920, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 3920, HTSUSA, provides for "Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials."

Note 10 to Chapter 39, HTSUS, provides:

In headings 3920 and 3921, the expression "plates, sheets, film, foil and strip" applies only to plates, sheets, film, foil and strip (other than those

of chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

The term "sheets" is not defined in the text of the HTSUSA or the Explanatory Notes. When terms are not so defined, they are construed in accordance with their common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

Webster's Third New International Dictionary (Webster's) (1986) defines "sheeting," in relevant part, as "1: material in the form of sheets or suitable for forming into sheets: as . . . b: material (as a plastic) in the form of a continuous film. . . ." *Id.* at 2092. Webster's defines "sheet," in relevant part, as "3 a: a broad stretch or surface of something that is usu. thin in comparison to its length and breadth. . . ." *Id.* at 2091. The *Oxford English Dictionary* (2d Ed. 1989) defines "sheet" as "9. a. A relatively thin piece of considerable breadth of a malleable, ductile, or pliable substance." *Id.* at 224.

The Court of International Trade has also examined the term sheet in various cases. In *3G Mermet Fabric Corp. v. United States*, 135 F. Supp. 2d 151 (2001), the Court defined "sheet" as a "material in the form of a continuous stem covering or coating."

In *Sarne Handbags Corp. v. United States*, 100 F. Supp. 2d 1126 (2000), the Court defined the term "sheeting" as follows:

[T]he common meaning of "sheeting" is material in the form of or suitable for forming into a broad surface of something that is unusually thin, or is a material in the form of a continuous thin covering or coating.

In HQ 965889, dated March 17, 2003, geotextile material manufactured from woven mesh visibly coated on both sides with plastics was classified in heading 3926, HTSUSA. In so doing, we determined that the open spaces of the geotextile material were large enough that the material could not be considered to have a "broad surface." The unusually wide spacing in the weave interrupts any sort of surface continuity that could be formed, with each warp and weft yarn essentially standing alone, except where they intersect. The weave was not tight enough, and the yarns were not close enough, for them to form a continuous surface.

Similarly, the World Customs Organization's (WCO) Harmonized System Committee (HSC) classified substantially similar merchandise in subheading 3926.90, HTSUSA. See Annex L/5 to Doc. NC0590B2 (HSC/29/May 2002). The HSC did not consider the geotextile material, with its large open weave, to be a "sheet." See Annex G/11 to Doc. NC0510E2 (HSC/28/Nov. 2001).

The instant extruded polyethylene plastic, like the geotextile material of HQ 965889 and that classified by the HSC, has open spaces and cannot be considered to have a broad surface. Thus, the mesh lacks the continuity necessary to be classified as a sheet of plastics of heading 3920, HTSUSA. Accordingly, the extruded polyethylene plastic is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other."

HOLDING:

NY G87431, dated March 20, 2001, is hereby revoked.

The extruded polyethylene plastic is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other." The general column one rate of duty is 5.3% *ad valorem*.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967348
CLA-2 RR:CR:TE 967348 KSH
TARIFF NO.: 3926.90.9880

MR. JOHN MATTSON
NORTH STAR WORLD TRADE SERVICES, INC.
980 Lone Oak Road, Suite 160
Eagan, MN 55121

RE: Modification of New York Ruling Letter (NY) H88635, dated February 21, 2002; Classification of extruded polyethylene mesh.

DEAR MR. MATTSON:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) H88635, issued to you on behalf of your client Treessentials Company, on February 21, 2002, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of extruded polyethylene mesh¹. The article was classified in subheading 3920.10.0000, HTSUSA, which provides for "other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene." We have reviewed that ruling and found it to be in error as it pertains to the classification of the extruded polyethylene mesh. Therefore, this ruling modifies NY H88635 as it pertains to the extruded polyethylene mesh.

¹ We note you also requested classification of a second article identified as 100% polyethylene open-work warp knit fabric, however this modification pertains only to the extruded polyethylene mesh.

FACTS:

The article, identified by you as "Black Extruded Netting", is an extruded polyethylene mesh. This article measures 14 feet in width and will be imported in 1000 foot lengths. It will weigh 2 to 5 pounds per 1000 square feet. It will be used in the agricultural industry to protect grape crops from damage by birds.

ISSUE:

Whether the extruded polyethylene mesh is classified in heading 3926, HTSUSA, or heading 3920, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 3920, HTSUSA, provides for "Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials."

Note 10 to Chapter 39, HTSUS, provides:

In headings 3920 and 3921, the expression "plates, sheets, film, foil and strip" applies only to plates, sheets, film, foil and strip (other than those of chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

The term "sheets" is not defined in the text of the HTSUSA or the Explanatory Notes. When terms are not so defined, they are construed in accordance with their common and commercial meaning. *Nippon Kogaku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

Webster's Third New International Dictionary (Webster's) (1986) defines "sheeting," in relevant part, as "1: material in the form of sheets or suitable for forming into sheets: as . . . b: material (as a plastic) in the form of a continuous film. . . ." *Id.* at 2092. Webster's defines "sheet," in relevant part, as "3 a: a broad stretch or surface of something that is usu. thin in comparison to its length and breadth. . . ." *Id.* at 2091. The Oxford English Dictionary (2d Ed. 1989) defines "sheet" as "9. a. A relatively thin piece of considerable breadth of a malleable, ductile, or pliable substance." *Id.* at 224.

The Court of International Trade has also examined the term sheet in various cases. In *3G Mermet Fabric Corp. v. United States*, 135 F. Supp. 2d 151 (2001), the Court defined "sheet" as a "material in the form of a continuous stem covering or coating."

In *Sarne Handbags Corp. v. United States*, 100 F. Supp. 2d 1126 (2000), the Court defined the term "sheeting" as follows:

[T]he common meaning of "sheeting" is material in the form of or suitable for forming into a broad surface of something that is unusually thin, or is a material in the form of a continuous thin covering or coating.

In HQ 965889, dated March 17, 2003, geotextile material manufactured from woven mesh visibly coated on both sides with plastics was classified in heading 3926, HTSUSA. In so doing, we determined that the open spaces of the geotextile material were large enough that the material could not be considered to have a "broad surface." The unusually wide spacing in the weave interrupts any sort of surface continuity that could be formed, with each warp and weft yarn essentially standing alone, except where they intersect. The weave was not tight enough, and the yarns were not close enough, for them to form a continuous surface.

Similarly, the World Customs Organization's (WCO) Harmonized System Committee (HSC) classified substantially similar merchandise in subheading 3926.90, HTSUSA. See Annex L/5 to Doc. NC0590B2 (HSC/29/May 2002). The HSC did not consider the geotextile material, with its large open weave, to be a "sheet." See Annex G/11 to Doc. NC0510E2 (HSC/28/Nov. 2001).

The instant extruded polyethylene mesh, like the geotextile material of HQ 965889 and that classified by the HSC, has open spaces and cannot be considered to have a broad surface. Thus, the mesh lacks the continuity necessary to be classified as a sheet of plastics of heading 3920, HTSUSA. Accordingly, the extruded polyethylene mesh is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other."

HOLDING:

NY H88635, dated February 21, 2002, is hereby revoked.

The extruded polyethylene mesh is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other." The general column one rate of duty is 5.3% *ad valorem*.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967349
CLA-2 RR:CR:TE 967349 KSH
TARIFF NO.: 3926.90.9880

MR. CHRIS MURRAY
AMERICAN CARGO EXPRESS, INC.
Newark International Airport / Seaport
435 Division Street
Elizabeth, NJ 07201

RE: Revocation of New York Ruling Letter (NY) D80028, dated July 28, 1998; Classification of extruded polypropylene mesh.

DEAR MR. MURRAY:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) D80028, issued to you on behalf of your client, Power Aisle, Inc., on July 28, 1998, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of extruded polypropylene mesh. The article was classified in subheading 3920.20.0000, HTSUSA, which provides for "other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of polypropylene." We have reviewed that ruling and found it to be in error. Therefore, this ruling revokes NY D80028.

FACTS:

The product consists of extruded polypropylene mesh made in a continuous extrusion process and not from pre-existing filaments. This mesh can be placed over trees and plants to protect vegetables and fruits from birds. The mesh will be sold in a package and measure 7 feet by 20 feet.

ISSUE:

Whether the extruded polypropylene mesh is classified in heading 3926, HTSUSA, or heading 3920, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 3920, HTSUSA, provides for "Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials."

Note 10 to Chapter 39, HTSUS, provides:

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In HQ 965889, dated March 17, 2003, geotextile material manufactured from woven mesh visibly coated on both sides with plastics was classified in heading 3926, HTSUSA. In so doing, we determined that the open spaces of the geotextile material were large enough that the material could not be considered to have a "broad surface." The unusually wide spacing in the weave interrupts any sort of surface continuity that could be formed, with each warp and weft yarn essentially standing alone, except where they intersect. The weave was not tight enough, and the yarns were not close enough, for them to form a continuous surface.

Similarly, the World Customs Organization's (WCO) Harmonized System Committee (HSC) classified substantially similar merchandise in subheading 3926.90, HTSUSA. See Annex L/5 to Doc. NC0590B2 (HSC/29/May 2002). The HSC did not consider the geotextile material, with its large open weave, to be a "sheet." See Annex G/11 to Doc. NC0510E2 (HSC/28/Nov. 2001).

The instant extruded polypropylene mesh like the geotextile material of HQ 965889 and that classified by the HSC, has open spaces and cannot be considered to have a broad surface. Thus, the mesh lacks the continuity necessary to be classified as a sheet of plastics of heading 3920, HTSUSA. Ac-

cordingly, the extruded polypropylene mesh is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other."

HOLDING:

NY D80028, dated July 28, 1998, is hereby revoked.

The extruded polypropylene mesh is classified in subheading 3926.90.9880, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other, Other." The general column one rate of duty is 5.3% *ad valorem*.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach

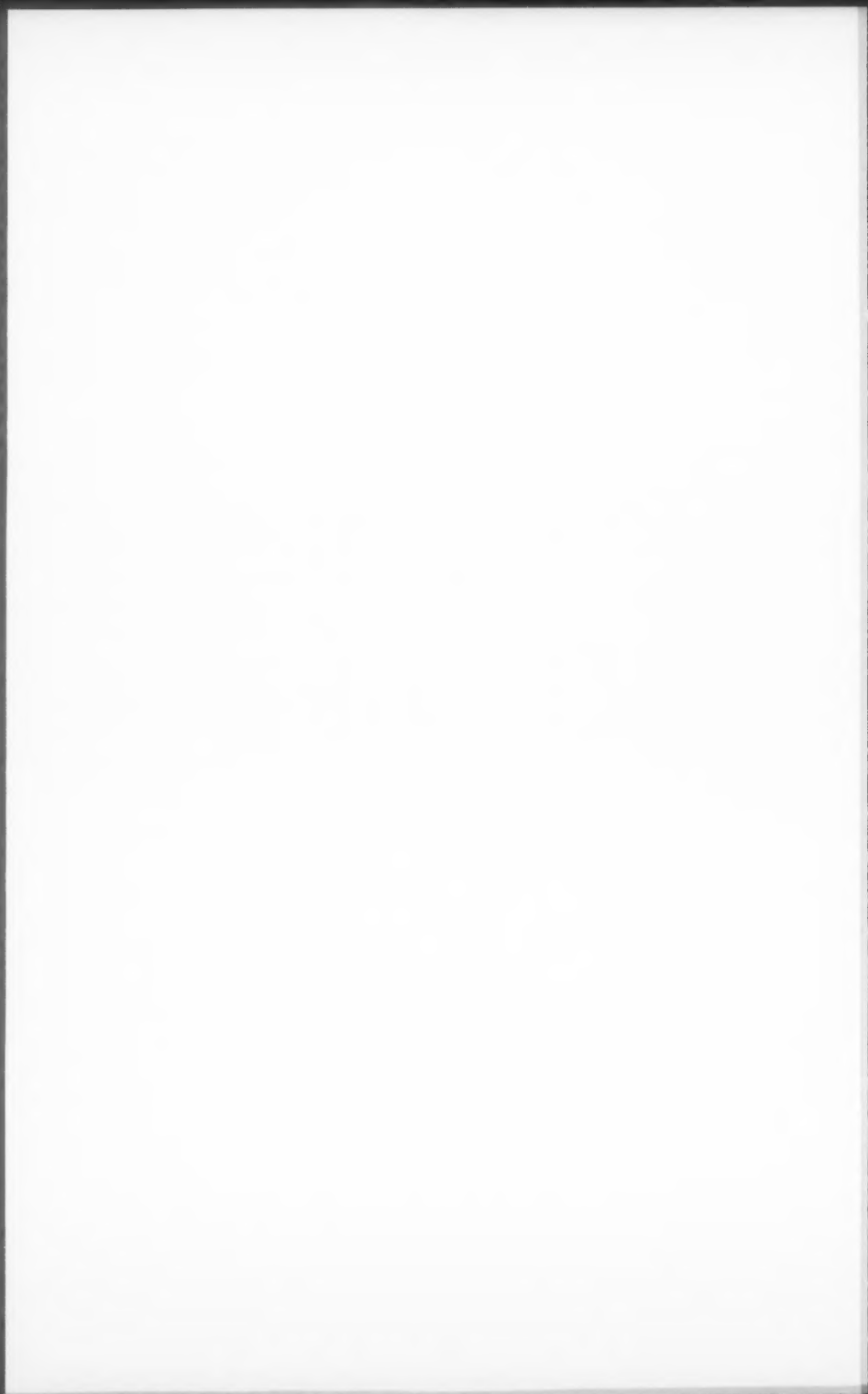
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon



Decisions of the United States Court of International Trade

Slip Op. 04-139

ALLIED MINERAL PRODUCTS, INC., Plaintiff, and THE 3M COMPANY and COMETALS, A DIVISION OF COMMERCIAL METALS COMPANY, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and C-E MINERALS, TREIBACHER SCHLEIFMITTEL CORPORATION, and WASHINGTON MILLS COMPANY, INC., Defendant-Intervenors.

Court No. 03-00936

Public Version

[ITC determination affirmed.]

Dated: November 12, 2004

Baker & McKenzie, LLP (Kevin M. O'Brien and Lisa A. Murray) for plaintiff and plaintiff-intervenor.

Barnes, Richardson & Colburn (Matthew T. McGrath and Stephen W. Brophy) for plaintiff-intervenor.

James M. Lyons, Acting General Counsel, *Robin L. Turner*, Acting Assistant General Counsel for Litigation, United States International Trade Commission (*Peter L. Sultan*) for defendant.

Schagrin Associates (*Roger B. Schagrin*) for defendant-intervenors.

OPINION

RESTANI, Chief Judge:

Plaintiff Allied Mineral Products, Inc. ("Allied Mineral") appears before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging the final determination issued by the U.S. International Trade Commission ("the Commission") in the antidumping investigation of refined brown aluminum oxide ("RBAO") from China. *Refined Brown Aluminum Oxide from China* (Nov. 2003), Pl.'s App., Tab 10 [hereinafter *Final Determination*].

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). In accordance with 19 U.S.C. § 1516a(b)(1)(B)(2000), the court shall

hold unlawful any determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law."

FACTUAL AND PROCEDURAL BACKGROUND

RBAO is a solid, inorganic chemical derived from the aluminum oxide in mined bauxites and produced by crushing, grinding, and sieving brown aluminum oxide ("BAO") in ingot or crude form. *Staff Report* (Oct. 9, 2003), at I-3, Pl.'s App., Tab 5. It is mainly used in the manufacture of abrasive products, such as grinding wheels, discs, and blasting media, and refractory applications such as the linings of furnaces and ovens, but is also used in the production of ceramics, pigments, and chemical reagents. *Id.* There are currently no domestic producers of crude BAO and five domestic producers of RBAO: C-E Minerals, Detroit Abrasives, Great Lakes, Treibacher Schleifmittel Corporation ("Treibacher") and Washington Mills Company, Inc. ("Washington Mills"). Thus, all five domestic producers depend upon imports of BAO to provide raw material for their domestic RBAO production. *Id.* at II-1.

The Commission instituted an investigation pursuant to a petition filed by Washington Mills on November 20, 2002, alleging that a domestic industry is materially injured and threatened with material injury by reason of less than fair value imports of RBAO from China. *Id.* at I-1. The International Trade Administration ("Commerce") defined the scope of the investigation to include:

ground, pulverized or refined artificial corundum, also known as brown aluminum oxide or brown fused alumina, in grit size of 3/8 inches or less. Excluded from the scope of the investigation is crude artificial corundum in which particles with a diameter greater than 3/8 inch constitute at least 50 percent of the total weight of the entire batch. The scope includes brown artificial corundum in which particles with a diameter greater than 3/8 inch constitute less than 50 percent of the total weight of the batch.

Refined Brown Aluminum Oxide from China, 68 Fed. Reg. 55589 (Dep't Commerce Sept. 26, 2003) (final). Following which, it found that the subject merchandise is being sold, or is likely to be, sold in the United States at less than fair value. *Id.*

In making its injury determination, the Commission defined the domestic like product more expansively than the subject merchandise, to include,

(1) all domestically produced merchandise corresponding to the definition in the scope of the investigation, as well as (2) any BAO for which particles with a diameter greater than 3/8 inch constitute at least 50 percent of the total weight of the entire

batch, as long as this product has been crushed, screened, and sorted into consistent sizes.

Final Determination at 8. The Commission found that Great Lakes engages in sufficient production-related activity in the United States to qualify as a member of the domestic industry, however, the issue was a "close one." *Id.* at 13. The Commission proceeded to exclude Great Lakes from the definition of domestic industry under 19 U.S.C. § 1677(4)(B) (2000), finding appropriate circumstances to do so based on Great Lakes' strong interest in maintaining access to the subject merchandise. *Id.* at 3. With Great Lakes' financial results excluded from consideration, the Commission determined that the domestic industry is materially injured by reason of imports of RBAO from China. *Id.* at 17.

DISCUSSION

The issue before the court is the Commission's discretion, under 19 U.S.C. § 1677(4)(B), to exclude Great Lakes from the definition of domestic industry. The relevant statute provides,

If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in *appropriate circumstances*, be excluded from the industry.

19 U.S.C. § 1677(4)(B)(ii) (emphasis added). The court has held that "[t]he decision whether to exclude parties who import or are related to exporters of the subject merchandise from consideration of the domestic industry is within the discretion of the Commission." *Torington Co. v. United States*, 16 CIT 220, 224, 790 F. Supp. 1161, 1168 (1992). In making this exclusion analysis, the Commission has used a three-step inquiry: (1) whether or not the company qualifies as a domestic producer; (2) whether or not the firm is related or importing subject merchandise; and (3) whether or not, in view of the relationship, there are appropriate circumstances for excluding the company from the definition of the domestic industry. *Empire Plow Co. v. United States*, 11 CIT 847, 853, 675 F. Supp. 1348, 1353 (1987). Here, the Commission excluded Great Lakes from the definition of domestic industry, finding appropriate circumstances under the third prong of this test because Great Lakes accrued a substantial benefit from its importation of the subject merchandise. *Final Determination* at 15.

Allied Mineral concedes that Great Lakes is an importer of the subject merchandise, and acknowledges that under this statute Great Lakes may be excluded from the Commission's definition of domestic industry where appropriate circumstances exist for exclusion. Allied Mineral challenges the Commission's "appropriate cir-

cumstances" rationale as unlawful arguing Great Lakes was excluded based on the affect on the injury determination Great Lakes' positive financial data would have generated, and the Commission did not apply the "appropriate circumstances" factors evenly to all domestic producers. Further, Allied Mineral challenges the Commission's "appropriate circumstances" rationale as unsupported by substantial evidence, arguing that Great Lakes did not accrue substantial benefits from its importation of the subject merchandise because its import behavior was in line with that of the other members of the domestic industry.

I. The Commission's Appropriate Circumstances Test is in Accordance with the Law.

As indicated, 19 U.S.C. § 1677(4)(B) permits the Commission to exclude domestic producers who import subject merchandise from the definition of domestic industry, if it determines that appropriate circumstances exist for exclusion. The most significant factor considered by the Commission in making the "appropriate circumstances" determination is whether the domestic producer accrued a substantial benefit from its importation of the subject merchandise. *Empire Plow*, 11 CIT at 853, 675 F. Supp. at 1353. Courts have emphasized that,

[a]lthough little legislative history behind the related parties provision exists, the provision's purpose is to exclude from the industry headcount domestic producers substantially benefiting from their relationships with foreign exporters. Congress enacted the provision so that domestic producers whose interests in the imports were strong enough to cause them to act against the domestic industry would be excluded from the ITC's consideration and investigation into material injury or threat thereof.

USEC, Inc. v. United States, 132 F. Supp. 2d 1, 12 (Ct. Int'l Trade 2001). Thus, the legislative history of § 1677(4)(B) evinces Congress' intent to exclude domestic producers who have accrued a substantial interest in the subject merchandise. *Empire Plow*, 11 CIT at 853, 675 F. Supp. at 1353; *Rock Salt from Canada*, 51 Fed. Reg. 3,271 (USITC Jan. 1986) (final).

Courts have also approved the Commission's consideration of the following factors: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation (whether to benefit from unfair trade practice or to enable them to continue production and compete in the domestic market); (3) whether inclusion or exclusion of the importing producer will skew the data for the rest of the industry; (4) the ratio of import shipments to U.S. production for the importing producer; and (5) whether the primary interest of

the importing producer lies in domestic production or importation. *Sandvik AB v. United States*, 13 CIT 738, 748, 721 F. Supp. 1322, 1332 (1989); *Torrington*, 16 CIT at 224, 790 F. Supp. at 1168; *Melamine Institutional Dinnerware from China, Indonesia, & Taiwan*, 62 Fed. Reg. 8,775 (USITC Feb. 1997) (final). The Commission is not required to make findings as to each specific factor. *Sandvik*, 13 CIT at 748, 721 F. Supp. at 1332.

A. The Commission May Consider Financial Results in Finding Appropriate Circumstances.

Allied Mineral argues that the Commission placed unlawful emphasis on Great Lakes' financial results to support its "appropriate circumstances" determination.¹ The court finds that the Commission considered Great Lakes' financial results as just one of numerous factors contributing to its conclusion that Great Lakes substantially benefitted from its importation of the subject merchandise. Accordingly, the Commission did not place unlawful emphasis on Great Lakes' financial results in making its "appropriate circumstances" determination.

The Commission's analysis of Great Lakes' financial results served to substantiate its finding that Great Lakes accrued a substantial benefit from its importation of the subject merchandise. First, the Commission found that Great Lakes substantially imported subject merchandise to meet its raw material requirements,² whereas other domestic producers imported crude BAO to meet their raw material requirements. Second, the record evidence indicates that Great Lakes was importing the subject merchandise at lower prices than

¹ In excluding Great Lakes from domestic industry, the Commission reasoned that,

Great Lakes accounted for [] percent of domestic production in 2002. The company [] Great Lakes imports the subject merchandise from China and processes a portion of its imports by further crushing, sizing, and/or packaging the product. Because Great Lakes relied virtually entirely on subject merchandise as an input for its further processing, its shipments of imports of refined BAO from China were equivalent to [] percent of its U.S.-produced commercial shipments in 2000, 2001, 2002, and early 2003. The company was a major importer of the subject merchandise throughout the period examined; it accounted for [] percent of total imports from China in 2000, 2001, 2002, and the interim 2003, respectively. In the course of interim 2003, Great Lakes began to shift from importing the subject merchandise to importing BAO that exceeded the grain size and weight parameters of the scope [definition]. As in the preliminary determination, we find that appropriate circumstances exist to exclude Great Lakes from the definition of the domestic industry. The company [], and thus has a strong interest in maintaining its access to these imports. The company's sales volume and overall financial results towards the end of the period examined reflect []. Indeed, Great Lakes' sales of refined BAO [], and its financial results [].

Final Determination at 15-16 (footnotes omitted).

² The subject merchandise amounted to [] percent of Great Lakes' raw material imports. *Petitioner's Final Comments* (Oct. 17, 2003), at Ex. 2, C.R. Doc. 121, Pl.'s App., Tab 4.

other domestic producers were paying for crude BAO. *Id.* The record also indicates that Great Lakes was using this cost advantage to increase sales volume by underpricing competing domestic RBAO producers. Thus, the Commission reasoned that Great Lakes' importation of the subject merchandise gave it a competitive advantage in domestic RBAO production, which translated into improved financial results.³

The court also finds that the Commission gave consideration to numerous factors within its discretion under § 1677(4)(B)(i), some of which are inextricably tied to Great Lakes' financial performance. The Commission's determination found that (1) the percentage of domestic production attributable to Great Lakes is significant; (2) Great Lakes imported a significant amount of subject merchandise in comparison to its U.S. production; and (3) Great Lakes' inclusion in domestic industry would skew the data for the rest of the industry. Moreover, the record supports additional findings that (1) Great Lakes decided to import the subject merchandise to benefit from an unfair trade practice; and (2) Great Lakes' primary interest lies in importation.⁴ Thus, the Commission's rationale is lawful under § 1677(4)(B)(i) and its consideration of Great Lakes' financial results is entirely consistent with its "appropriate circumstances" determination.

B. The Commission's Treatment of the Other Domestic Producers was not an Unfair, Discriminatory Application of the Appropriate Circumstances Test.

Allied Mineral argues that the Commission's analysis is unlawful because it focuses on Great Lakes' interests in the subject merchandise, while ignoring the same interests of the other domestic producers. According to Allied Mineral, domestic producers C-E Minerals and Treibacher are prime candidates for exclusion because, like Great Lakes, during the period of investigation they imported raw material from China that was further processed into RBAO. Moreover, Allied Mineral contends that both C-E Minerals and Treibacher are: (1) affiliated with Treibacher Schleifmittel Guizhou Co., Ltd., a Chinese producer and exporter of RBAO; (2) related to Graystar LLC, a U.S. importer of RBAO from China; and (3) owned by Imerys, a foreign based company. Finally, Allied Mineral argues that Detroit Abrasives would have been a more appropriate domestic producer to

³ During the period of investigation, Great Lakes' sales volume [redacted], while the results for the other domestic producers [redacted]. *Staff Report* at VI-5, Table VI-2.

⁴ Questionnaire responses indicate that Great Lakes' customers perceived the company to be an importer. A refractories end user, [redacted], indicated that it [redacted]. *Questionnaire Response* (August 8, 2003), C.R. Doc. 52, Def.-Inter.'s App., Tab 17. Further, [redacted] reported that all of its RBAO purchases were from Great Lakes and that the RBAO was from China, but "sized and packaged by Great Lakes Minerals." *Questionnaire Response*, (August 6, 2003), C.R. Doc. 51, Def.-Inter.'s App., Tab 12.

exclude because it acted against the interests of domestic industry by opposing the petition for relief.⁵

First, the Commission concluded that Great Lakes was a major importer of subject merchandise,⁶ whereas Treibacher and C-E Minerals imported raw material from China, but were not major importers of the subject merchandise. Record evidence shows that Treibacher imported relatively small amounts of the subject merchandise during the period of investigation.⁷ As for C-E Minerals, the Commission found that it was a major importer of the subject merchandise in 2000 and 2001,⁸ but in those years it did not produce RBAO domestically. Following its acquisition by Imerys, however, C-E Minerals began domestic production of RBAO and in 2002 it ceased importation of the subject merchandise. Therefore, the Commission's decision not to exclude Treibacher and C-E Minerals from the definition of domestic industry is reasonable because they are not major importers of the subject merchandise.

Second, neither Treibacher nor C-E Minerals has the affiliations or relationships required by § 1677(4)(B) to be excluded as related parties from domestic industry. Under § 1677(4)(B)(i), a domestic producer can be excluded as a related party if it is related to "an exporter or importer of the subject merchandise." A domestic producer is related if:

- (I) the producer directly or indirectly controls the exporter or importer,
- (II) the exporter or importer directly or indirectly controls the producer,
- (III) a third party directly or indirectly controls the producer and the exporter or importer, or

⁵ This argument arises from *USEC*, in which the court notes that "Congress enacted the provision so that domestic producers whose interests in the imports were strong enough to cause them to *act against* the domestic industry would be excluded from the ITC's consideration and investigation into material injury or threat thereof." *USEC*, 132 F. Supp. 2d at 12 (emphasis added). Such a reading of *USEC* would establish a high bar to exclusion, contrary to this court's precedent as to Commission exclusion determinations. *Sandvik*, 13 CIT at 748, 721 F. Supp. at 1332; *Torrington*, 16 CIT at 224, 790 F. Supp. at 1168. This interpretation would be over-inclusive in excluding Detroit Abrasives, which imported a mere [] of subject merchandise during 2002. *Staff Report* at III-6 n.28.

⁶ The Commission found that Great Lakes purchased [] of its raw material inputs through importation of the subject merchandise. *Id.* at III-5. As a share of total reported imports of subject merchandise, Great Lakes' imports amounted to a substantial [] percent for 2000, 2001, 2002, and January through June 2003 respectively. *Id.*

⁷ Treibacher's importation of the subject merchandise amounted to [] percent of total reported imports of subject merchandise for 2000, 2001, 2002, and January through June 2003 respectively. *Id.* at III-3 n.12.

⁸ C-E Minerals' imports of the subject merchandise amounted to a substantial [] percent of total reported imports of subject merchandise for 2000 and 2001 respectively. *Id.* at III-4 n.15.

(IV) the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer.

19 U.S.C. § 1677(4)(B)(ii). Here, Allied Mineral argues that C-E Minerals and Treibacher are related parties with Treibacher Schleifmittel, Graystar, and Imerys. No domestic producer can be excluded as a related party, however, unless the party to whom they are related is an exporter or importer of the subject merchandise.

Treibacher Schleifmittel is a Chinese producer and exporter of RBAO, but it does not export any RBAO to the United States. *Petitioner's Postconference Brief* (Dec. 17, 2002), at A-6, P.R. Doc. 28, Def.'s App., Tab 3. Therefore, neither its relationship with Treibacher nor its relationship with C-E Minerals triggers the application of § 1677(4)(B). Graystar is an importer of the subject merchandise, so § 1677(4)(B) is triggered. But, in order for a related party to be excluded, appropriate circumstances must exist for exclusion. Here, appropriate circumstances do not exist because neither C-E Minerals nor Treibacher have accrued a substantial benefit from Graystar's importation of the subject merchandise.⁹ Finally, Imerys is a foreign based company which owns C-E Minerals and Treibacher. Allied Mineral argues that by virtue of its ownership of the two companies, Imerys has an incentive to gain market share at the expense of domestic RBAO producers. The court finds that such an interest does not make Imerys an importer or exporter of the subject merchandise as required by § 1677(4)(B). Accordingly, the court finds that the Commission consistently applied the "appropriate circumstances" factors to all domestic producers.

II. The Commission's Determination is Based on Substantial Evidence.

Allied Mineral challenges the Commission's decision to exclude Great Lakes from domestic industry as not based on substantial evidence. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1363 (Fed. Cir. 2004). The court finds the record evidence sufficient to support the Commission's determination that appropriate circumstances exist for Great Lakes' exclusion.

The Commission excluded Great Lakes from domestic industry because it found that its interest in the subject merchandise is adverse

⁹ Its imports accounted for [] percent of total imports of RBAO from China for 2000, 2001, 2002, and January through June 2003 respectively, and were thus []. *Graystar LLC Importer's Questionnaire Response* (July, 21, 2003), at 5, C.R. Doc. 33, Def.'s App., Tab 5.

to the domestic industry's interest in securing antidumping duties. According to the Commission, Great Lakes substantially benefitted from its importation of the subject merchandise by using the subject merchandise as raw material for its domestic RBAO production. Under the Commission's theory, Great Lakes' competitive advantage begins when it receives bargain prices for imports of the subject merchandise. Some of the subject merchandise is resold without any further processing, although the majority is used as raw material inputs in Great Lakes' domestic RBAO production. Great Lakes then sells the domestically produced RBAO at below market prices, increasing both sales volume and profits because of its raw material cost advantage.¹⁰

Allied Mineral argues that there is insufficient record evidence to support the Commission's determination. First, it argues that there is no evidence that Great Lakes accrued a substantial benefit through importation of the subject merchandise. According to Allied Mineral, all domestic producers share the same commercial interest in importing raw material for the purpose of processing and selling RBAO. Even though Commerce's definition of the subject merchandise includes the raw materials imported by Great Lakes, Allied Mineral argues that Great Lakes' subject merchandise imports are commercially indistinguishable from the non-subject crude BAO imported by other domestic producers.

¹⁰ Allied Mineral challenges the Commission's rationale that Great Lakes received a more valuable product at a lower price as a post hoc explanation for the Commission's findings. It argues that as a rationalization after the fact it must be rejected as a matter of course. See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) ("A simple but fundamental rule of administrative law is that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."); see also *In re Sang-Su Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("Consideration by the appellate tribunal of new agency justifications deprives the aggrieved party of a fair opportunity to support its position; thus review of an administrative decision must be made on the grounds relied on by the agency."). The administrative record, however, "need only indicate the determinative reason for the final action taken, and thus a court may uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Pension Benefit Guar. Corp. v. Wilson N. Jones Memorial Hosp.*, 374 F.3d 362, 367 (5th Cir. 2004).

The court finds that the Commission's determinative reason for its exclusion decision was that Great Lakes accrued a substantial benefit in its domestic RBAO production through importation of subject merchandise. The administrative record makes it reasonably clear that Great Lakes was benefitting from a significant cost advantage achieved through importation of subject merchandise that is more valuable and less costly than crude BAO. The Commission cited the fact that Great Lakes' importation of the subject merchandise accounted for [] percent of its imports, whereas other domestic producers imported relatively small amounts of the subject merchandise. *Final Determination* at 15. Moreover, during the period of investigation, Great Lakes' financial results [], while the other domestic producers were all experiencing [] financial results. *Id.* Record evidence also suggests that Great Lakes was perceived as an importer by its customers. A refractories end user, [], indicated that it []. *Questionnaire Response*, C.R. Doc. 52, Def.-Inter.'s App., Tab 17.

Second, Allied Mineral asserts that even the Commission recognized that the true commercial distinction lies between BAO imported as a raw material input and BAO imported as a finished product. The Commission found that,

[t]he size and the weight parameters contained in the scope definition do not reflect precisely the understanding within the industry of the distinction between refined and crude BAO. Rather, the record shows that an important distinction between crude and refined product in the industry is that the refined product has been sized and is thus ready for use by industrial consumers.

Final Determination at 8. Allied Mineral also points out that Great Lakes altered its import practices following the onset of the antidumping investigation, substituting imports of crude BAO for imports of the subject merchandise to fulfill its raw material requirements.¹¹ Therefore, according to Allied Mineral, Great Lakes never accrued a substantial benefit from its importation of the subject merchandise because it can obtain the same product by importing crude BAO.

The court finds sufficient evidence supporting the Commission's conclusion that Great Lakes accrued a substantial benefit from its importation of the subject merchandise. The record evidence shows that Great Lakes was using the subject merchandise as a raw material input to maintain a competitive advantage in selling further processed RBAO in the domestic marketplace. Great Lakes achieved this advantage by importing a more valuable product than crude BAO at a lower price.

Allied Mineral disputes the contention that Great Lakes was receiving a more valuable product at a lower price. Allied Mineral contends that the Commission acknowledged the lack of price distinction in its final determination when it stated that "there is no evidence of a significant difference in price between product on ei-

¹¹ In early 2003, Great Lakes added additional capital equipment to increase its crushing and sizing capability, making it better equipped to handle larger sized BAO. *Staff Report* at III-6. Over the course of 2003, Great Lakes began to shift from imports of subject merchandise to imports of crude BAO that exceed the grain size and weight parameters of the scope definition. *Id.* Allied Mineral contends that if Great Lakes could make this shift from in-scope to out-of-scope imports in 2003, it must not benefit from maintaining access to the subject merchandise.

But, Great Lakes attributed its importation shift to cost factors: "With the filing of the antidumping investigation, and the potential for antidumping duty liabilities associated therewith, it became cost-prohibitive to continue importing subject refined brown aluminum oxide." *Id.* The court finds that Great Lakes' import behavior merely shows that following the onset of antidumping duties, importation of the subject merchandise is more expensive than importation of crude BAO. If the antidumping duty discipline is removed, Great Lakes can easily shift its importation back to the subject merchandise to regain its cost advantage in domestic RBAO production.

ther side of the 3/8 inch parameter."¹² *Final Determination* at 8-9. Moreover, citing import prices from 2002, Allied Mineral asserts that the average cost of imports of subject merchandise is nearly identical to the cost of imports of crude BAO. Thus, Allied Mineral argues that both the record evidence and the Commission's own findings indicate that Great Lakes does not have a substantial interest in the subject merchandise because it achieved no benefit by purchasing the same product at the same price. The court disagrees.

The Commission "has the discretion to make a reasonable interpretation of the facts, and the court will not decide whether it would have made the same decision on the basis of the evidence." *Torington*, 16 CIT at 225, 790 F. Supp. at 1168-69. Here, the record evidence shows a significant price distinction in 2002 between Great Lakes' imported subject merchandise that required further processing and the non-subject crude BAO imported by the other domestic producers.¹³ Moreover, in 2000 and 2001, there was a greater spread between what Great Lakes paid for subject merchandise that required further processing and what the other domestic producers paid for crude BAO.¹⁴

Even if there were only a small difference in price, the Commission found that purchasers of the subject merchandise receive a more valuable product than purchasers of crude BAO. A purchaser of RBAO, such as Great Lakes, is receiving smaller, "more refined" particles that are more valuable because there is less crushing and sorting to do before resale. Further, record evidence shows that the degree of value added by Great Lakes' domestic processing is much lower than that of most other domestic producers. *Staff Report* at VI-8. Therefore, substantial evidence supports the Commission's conclusion that Great Lakes accrued a substantial benefit from its importation of the subject merchandise to meet its raw material requirements.

¹² The Commission subsequently included within the definition of like product "any BAO where particles with a diameter greater than 3/8 inch constitute at least 50 percent of the total weight of the entire batch, as long as this product has been crushed, screened, and sorted into consistent sizes." *Final Determination* at 7-8. The Commission's statement refers to the lack of evidence of a price distinction between subject merchandise and crude BAO that has been crushed, screened, and sorted; not a lack of evidence of a price distinction between subject merchandise and crude BAO used as raw material inputs.

¹³ In 2002, Great Lakes paid an average of [] for RBAO from China that required further processing, while Treibacher and Washington Mills paid an average of [] and [] respectively for crude BAO. *Petitioner's Final Comments*, at Ex. 2, Def.'s App., Tab 4.

¹⁴ In 2000, Great Lakes paid an average of [] for RBAO from China that required further processing, while Treibacher and Washington Mills paid an average of [] and [] respectively for crude BAO. In 2001, Great Lakes paid an average of [] for RBAO from China that required further processing, while Treibacher and Washington Mills paid an average of [] and [] for crude BAO. *Id.*

CONCLUSION

In light of the foregoing, the court sustains the Commission's Final Determination. The Commission's determination that appropriate circumstances exist to exclude Great Lakes, an importer of the subject merchandise, from the definition of the domestic industry is supported by substantial evidence and is in accordance with the law.

Slip Op. 04-141

RUSS BERRIE & COMPANY, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 00-00018

JUDGMENT ORDER

In accordance with the decision (August 27, 2004) and mandate (October 18, 2004) of the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), Appeal No. 04-1084, reversing this Court's decision in *Russ Berrie & Co. v. United States*, 27 CIT ___, Slip Op. 03-122 (Sept. 17, 2003) ("*Russ Berrie*"), it is hereby

ORDERED that this Court's Opinion and Judgment in *Russ Berrie*, holding that the subject merchandise should be classified under subheadings 9505.10.2500 and 9505.90.6000 of the Harmonized Tariff Schedule of the United States, are vacated; and it is further

ORDERED, ADJUDGED, and DECREED that the classification of the subject merchandise by the U.S. Bureau of Customs and Border Protection under subheadings 7117.19.90 and 7117.90.90 of the Harmonized Tariff Schedule of the United States is correct, in accordance with the Federal Circuit's decision and mandate, and judgment is entered for Defendant.

SO ORDERED.

Slip Op. 04-142

FORMER EMPLOYEES OF MURRAY ENGINEERING, INC. Plaintiff, v.
ELAINE L. CHAO, UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Pogue, Judge
Court No. 03-00219

[Remanded to the Secretary of Labor for further investigation.]

Decided: November 15, 2004

Ken Walter, Pro Se, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia M. McCarthy, Assistant Director, Stephen C. Tosini, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Jayant Reddy, Attorney, Of Counsel, Office of the Solicitor, U.S. Department of Labor, for Defendant.

OPINION

Pogue, Judge: In this action, Plaintiff challenges the second remand determination of the Department of Labor ("Labor") regarding his claim for trade adjustment assistance under the Trade Act of 1974 ("the Act").¹ Labor's second remand determination follows the Court's opinion in *Former Employees of Murray Eng'g, Inc. v. Chao*, slip op. 04-45 (CIT May 4, 2004) ("*Murray I*").² In its second remand determination, Labor found that Plaintiff could not be certified as eligible for trade adjustment assistance because Plaintiff's former company, Murray Engineering, Inc., ("*Murray*") did not produce an article within the meaning of the Act. *Murray Engineering, Inc., Complete Design Service, Flint, Michigan*, 69 Fed. Reg. 52,935, 52,936 (Dep't Labor Aug. 30, 2004) (notice of negative determination on remand) ("*Second Remand Determ.*"). Labor also found that to the extent that Plaintiff's company did produce an article, Plaintiff's company did not lose business due to increased imports of like or directly competitive articles.³ *Id.* at 52,937. Labor also found that

¹Labor first voluntarily remanded this case for further investigation as to whether Plaintiff's company produced an "article" within the meaning of the Act. See *Former Employees of Murray Eng'g v. United States*, slip op. 03-71, at 1 (CIT June 27, 2003). Labor's first, voluntary remand determination was then remanded by the Court, making the determination challenged in this action Labor's second remand determination.

²Familiarity with this opinion is presumed.

³Section 222 of the Trade Act of 1974, as amended, is codified at 19 U.S.C.A. § 2272 (West Supp. 2004). It reads, in pertinent part:

(a) *In general*

A group of workers . . . shall be certified by the Secretary as eligible to apply for adjustment assistance under this part . . . if the Secretary determines that—

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated . . . ; and . . .

Plaintiff was not eligible for certification as a secondarily-affected worker for two reasons.⁴ First, Plaintiff's former employer did not produce a component part for a certified company and, second, the certified company for which Plaintiff claimed his company provided component parts last did business with Plaintiff's company several years before Plaintiff's claim, and thus, loss of work from that company was not a contributing factor to Plaintiff's layoff. *Id.* at 52,937.

Because the record discloses that Plaintiff's company produced an article within the meaning of the Act, and because the record fails to show the legal basis for Labor's finding that there were no imports of directly competitive articles, the Court remands this case to Labor for further investigation. The Court defers consideration of the claim for certification as a secondarily-affected worker until such time as Labor has explained the basis of its determination that Plaintiff's former employer was not affected by imports of "directly competitive" articles.

STANDARD OF REVIEW

The Act provides for judicial review of Labor's eligibility determinations. *See* 19 U.S.C. § 2395(a) (West Supp. 2004).⁵ Subsection (b) of this provision requires that, in reviewing a denial of certification of eligibility, "[t]he findings of fact by the Secretary of Labor . . . , if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 2395(b) (West Supp. 2004). As discussed in *Murray I*, the statute does not mention how this Court is to treat Labor's legal determinations. *See Murray I*, slip op. 04-45, at 6. Where a statute authorizing judicial review does not state the precise level of review, the Courts have recourse to the standards outlined under the Administrative

(2)(A)(iii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased.

19 U.S.C.A § 2272(a) (West Supp. 2004).

⁴ Congress re-authorized trade adjustment assistance, as provided by the Act, in 2002. Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107-210, § 111, 2002 U.S.C.A.N. (116 Stat.) 935, 936. Congress also amended the Act to cover "adversely affected secondary workers." *Id.* at § 113. This new coverage is codified at 19 U.S.C.A. § 2272(b). 19 U.S.C.A. § 2272(b) (West Supp. 2004). This provision grants eligibility for trade adjustment assistance to workers if their firm either was a supplier of "component parts" to a producer certified for adjustment assistance or if loss of business with a certified producer contributed importantly to the workers' separation. *Id.*

⁵ 19 U.S.C. § 2395(a) reads, in part:

(a) *Petition for review; time and place of filing*

A worker, group or workers, . . . or group aggrieved by a final determination of the Secretary of Labor under section 2273 of this title . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.

19 U.S.C. § 2395(a) (West Supp. 2004).

Procedure Act ("APA"). See 5 U.S.C. § 701(a)(2000).⁶ The APA provides that agency determinations shall be held invalid where they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Under this standard, it is clear that an agency's determination cannot be upheld where it fails to acknowledge applicable law or to demonstrate how it reaches its conclusions of law. See *Arizona Grocery v. Atchison Ry.*, 284 U.S. 389 (1931) (holding that an agency may not refuse to recognize its own rules or regulations with retroactive effect), *Burlington Truck Lines Co. v. United States*, 371 U.S. 156, 168 (1962) (holding that an agency determination must show "a rational connection between the facts found and the choice made.")

DISCUSSION

In its remand order, the Court directed Labor to develop the factual record to reflect the percentage of Murray's designs embodied in forms comprising "articles." *Murray I*, slip op. 04-45, at 22. Labor found that 100% of Murray's designs were embodied on CD-Rom and that for two-thirds of the designs, Murray also provided printed copies.⁷ *Second Remand Determ.* at 52,395. These facts vided for in the

⁶ 5 U.S.C. § 701(a) states:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a)(2000). No statute precludes judicial review of Labor's eligibility determinations under the Act; in fact, 19 U.S.C. § 2395(b) authorizes such review. Moreover, while Congress has delegated to Labor the duty of investigating eligibility claims and granting and denying them, nothing in the Act indicates that Congress meant this delegation to be so broad as to allow Labor to make determinations that would be otherwise arbitrary and capricious, i.e., not explained on the record, or otherwise not in accordance with law.

⁷ Despite the Court's holding in *Murray I* that Plaintiff's designs are articles provided for in the HTSUS, at least to the extent that they were either printed out or embodied on such media as CD-ROMs and floppy disks, Labor devoted the majority of its administrative record on this remand to arguments that the HTSUS does not furnish a proper guide for the inquiry into what constitutes an "article" under the Act and that even to the extent the HTSUS applies, Murray's blueprints are not provided for in the HTSUS. See *Second Remand Determ.* at 52,936-37. Such arguments do not persuade the Court here.

First, the language of the Act clearly indicates that the HTSUS governs the definition of articles, as it repeatedly refers to "articles" as items subject to a duty. See, e.g., 19 U.S.C. §§ 2119, 2252(d)(4)(B)-(C)(2000) (discussing "rate of duty on any article", "amount of duty with respect to any article," suspension of liquidation "with respect to an imported article," and imposition of duty "with respect to an imported article"). While the references to "articles" in § 2272 do not include such express references to duties, where a statute uses a term repeatedly, it is considered to maintain a uniform meaning throughout. See *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1346-47 (Fed. Cir. 2002); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382-83 (Fed. Cir. 2001). Moreover, Labor provides the Court with no reason that "articles" of § 2272 should not refer to dutiable items when the term "articles" is used throughout the Act to refer to such items or is otherwise used in a manner which does not betray any other intended meaning. Indeed, as § 2272 refers to imports of "articles," it would be strange indeed were articles for purposes of § 2272 not also objects provided for in the HTSUS. As printed designs and designs on CD-ROM and diskette are pro-

demonstrated that Murray produced articles within the meaning of the Act.⁸ Labor then went on to investigate the question of whether Plaintiff's job loss was related to increased competition from imports of like or directly competitive articles. *Id.* at 52,937. Labor concluded

vided for in heading 4911, HTSUS (2003), and subheading 8524.39.40, HTSUS (2003), such items are "articles" within the meaning of the Act.

Second, while Labor found that some of Murray's customers pay by the hour for the production of designs made to their specifications, see *Second Remand Determ.* at 52,935, this fact does not change the text or meaning of the HTSUS, which clearly provides for printed or recorded blueprints as articles. Also, while Labor may claim that application of the HTSUS's provisions for recorded electronic media, such as CD-ROMs, leads to an absurd result, in that the provisions do not place a particular value on the information recorded therein, regardless of the fact that the value of the recorded information may be far greater than the value of the media, see *Second Remand Determ.* at 52,936, that result obtains from a plain reading of the text, and is not one that appears to have troubled Congress. Moreover, the Court notes that the HTSUS differentiates between CD-ROMs that are blank and those upon which data has been saved. See headings 8523 and 8524, HTSUS. Therefore, in saving information to a blank disk, Murray works a "tariff shift," producing an entirely new article. Similarly, blank paper and paper upon which blueprints are printed are distinct articles under the HTSUS, i.e., printing a blank paper with blueprints results in the creation of a new and distinct article under the Act.

The Court notes that in its first remand determination Labor itself recognized the Act's repeated references to articles as objects subject to a duty and consequently relied on the HTSUS to determine whether or not a given good is an article. *Murray I*, slip op. 04-45, at 10. Indeed, given the text of the Act, Labor had good reason to rely on the HTSUS. It is simply disingenuous for the agency, upon learning that the HTSUS does not provide the result the agency appears to have already chosen, to now argue that it is inappropriate to refer to the HTSUS in order to determine whether the product Plaintiff's former employer makes constitutes an article for the purposes of the Act.

Nevertheless, the Court recognizes that the ability of the HTSUS to control the outcome of adjustment assistance cases is not unlimited. For example, there are a number of goods that are exempted from duty under the HTSUS. But even where the application of the HTSUS might result in a good that would normally be considered simply incidental to a service (such as a fast food hamburger) being labeled an article under the Act, this is not reason to believe that all and any workers will be able to successfully file for TAA, contrary to Congress' intentions. The Act requires that increased imports of like or directly competitive articles have contributed importantly to the former employees' separation. It is highly probable that in many cases, even where the former employees can show that they were in some way engaged in producing an article, that article will not be the subject of increasing foreign importation that results in domestic job losses. At any rate, on the facts presented here, it remains that blueprints, whether printed or on CD-ROM, appear to be provided for as "articles" under the HTSUS, and therefore, the Act.

⁸Labor's error appears to stem from its failure to distinguish between factual and legal determinations. Labor provides several legal sources categorizing various industries as either "service" industries or "manufacturing" industries. See United Nations Statistics Division, Classifications Registry, C.R. Doc. No. 20, World Trade Organization, Services Sectoral Classification List, C.R. Doc. No. 21, U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook (2004), C. R. Doc. No. 25. These sources, however, are not relevant to understanding the way the term "article" is defined under the Act. While other legal sources may differentiate between objects produced by service industries versus objects produced by manufacturing industries, the Act requires only that the object made be within the embrace of the HTSUS. Therefore, categorizations of industries provided by the United Nations, the World Trade Organization, or even Labor's own Bureau of Labor Statistics are not relevant to understanding the use of the word "article" under the Act. This is precisely because they do not speak to the definition of the word "article" as used in the Act, but rather to the categorization of industries for entirely other purposes.

that increased imports of like or directly competitive articles did not contribute to the layoffs at Plaintiff's company. *Id.*

Labor's investigation into imports of like or directly competitive articles, however, consisted only of contacting Murray's major declining customers to ask them if their orders with Murray had ceased or been scaled down due to their increased imports of designs from abroad. *Id.* All replied in the negative. *Id.* Labor therefore concluded that increased competition from imports of either like or directly competitive articles had not contributed to the layoffs at Murray. *Id.*

Labor's determination suffers from two deficiencies. First, it betrays a lack of understanding of the industry it is investigating and the requirements of the Act. Second, Labor failed to make reference to relevant law regarding directly competitive articles, including Labor's own regulations on the matter, or to explain how, given such relevant law, the facts found support Labor's conclusion that there were no imports of directly competitive articles.

First, Murray is in the business of providing custom designs for the construction of "machines, tools, gauges, dies, molds and fixtures for hydraulic, pneumatic, mechanical, and electrical systems used in the manufacture of products" to its customers. *Second Remand Determ.* at 52,935; see also *Murray I*, slip op. 04-45, at 3. While Labor asked Murray's major declining customers whether they had ceased to buy designs from Murray because they were importing foreign designs, it failed entirely to address itself to the more likely scenario that Murray's customers no longer had as much business for Murray because they themselves had either failed to win bids to provide machinery to other companies, or because increased foreign competition meant that they could no longer afford to create new machinery for themselves.⁹ See Memorandum from Del-Min Amy Chen to The File, *Re: MURRAY ENGINEERING, INC., Flint, Michigan*, C.R. Doc. No. 27 at 148 (July 6, 2004); Facsimile from Gene Sperry, Lansing Tool & Eng'g Inc., to Del-Min Amy Chen, *Re: Survey*, C.R. Doc. No. 28 at 149-50 (July 7, 2004); Facsimile from Matt Sawyer, Reinhart Indus., Inc., to Del-Min Amy Chen, C.R. Doc. No. 29 at 151-53 (July 7, 2004); Facsimile from Bill Meek, Delphi-East, to Del-Min Amy Chen, C.R. Doc. No. 30 at 154-155 (July 16, 2004); Facsimile from Christopher Mill to Del-Min A. Chen, C.R. Doc. No. 31 at 156-57 (July 21, 2004); Memorandum from Del-Min Amy Chen to The File, *Re: MURRAY ENGINEERING, INC., COMPLETE DESIGN SERVICES, FLINT MICHIGAN*, C.R. Doc. No. 32 at 158 (July

⁹The record does not reveal the extent to which Murray's major declining customers needed Murray's designs to create machinery for their own use, or to fulfill contracts to provide machinery to others, although communications with Murray's customers reveal that certain customers were manufacturing objects in fulfillment of a contract to provide such goods to others. See, e.g., Facsimile from Bill Meek, Delphi-East, to Del-Min Amy Chen, C.R. Doc. No. 30 at 154-155 (July 16, 2004).

23, 2004); Facsimile from Dale A. Erdman to Del-Min Amy Chen, C.R. Doc. No. 33 at 159 (Rec'd Aug. 2, 2004). Moreover, Labor failed to ask Murray's former customers whether their business with Murray had declined because either they or their customers had moved manufacturing operations abroad, thus making it more prudent to have their manufacturing machines designed and built abroad. *Id.* In such a case, the correct inquiry would not be to investigate imports of designs, or even to investigate imports of manufacturing machinery, but to investigate imports of items of manufacture which formerly would have been built in the United States on machines produced by Murray's customers.

Such manufactured products would be, of course, different articles than designs for manufacturing machines. But the language of the Act clearly contemplates that harmful effects may result from imports of products which are not "like" those produced by domestic companies, but which are instead "directly competitive." Labor's investigation did not even inquire into imports of "directly competitive" articles.

Second, Labor has defined the term "directly competitive" by regulation. Under 29 C.F.R. § 90.2 (2004), a directly competitive product may be *either* a product that is commercially substitutable for a domestic product, or represent the domestic product in an earlier or later stage of processing:

Like or directly competitive means that *like* articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which the articles are made, appearance, quality, texture, etc.); and *directly competitive* articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes (i.e., adapted to the same uses and essentially interchangeable therefor).

An imported article is *directly competitive with* a domestic processing, article at an earlier or later stage of and a domestic article is *directly competitive with* an imported article at an earlier or later stage of processing, if the importation of the article has an economic effect on producers of the domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article.

29 C.F.R. § 90.2 (emphasis in original).

This regulation requires Labor to investigate two questions. First, while designs and manufactured products are obviously not "substantially equivalent for commercial purposes," do designs for heavy machinery represent an "earlier stage of processing" of the products manufactured on such machines? Second, if designs are an "earlier stage of processing" of manufactured products, does the importation

of such manufactured goods have an economic effect comparable to importation of articles in the same stage of processing as the domestic article, i.e., the designs?

The *Second Remand Determin.* does not address these questions. Indeed, Labor did not even cite to 29 C.F.R. § 90.2 in its determination that there were no imports of directly competitive articles, although the regulation is directly on point. It is not the Court's province, in the first instance, to determine the meaning of Labor's regulation and then attempt to apply it to the facts of this case. It is, however, Labor's duty. Therefore, because the *Second Remand Determin.* does not explain the legal basis for the finding that there were no imports of directly competitive articles, the Court remands to Labor for explanation of how its finding that Murray's customers' non-importation of designs suffices to show that there were no imports of directly competitive articles under 29 C.F.R. § 90.2. In addition, in light of Labor's second remand determination on this issue, Labor is also directed to re-open its investigation to determine whether imports of like or directly competitive articles from abroad contributed to the cessation or decline of orders from Murray's major customers.¹⁰

CONCLUSION

Labor shall have until January 14, 2005 to submit its remand determination. The parties shall have until January 28, 2005 to submit comments on the remand determination. Rebuttal comments shall be submitted on or before February 4, 2005.

¹⁰The Court notes that Labor received three extensions of time in which to file its *Second Remand Determin.* See Order (July 8, 2004), Order (Aug. 10, 2004), Order (Aug. 17, 2004). Nonetheless, Labor's investigation appears to have dealt not with the amplified fact-finding with which the Court charged the agency, but with revisiting issues the Court already resolved in *Murray I*. Meanwhile, Plaintiff has not yet had the benefit of a final, supportable determination as to his claim. Labor should consider itself apprised that the Court will not reward dilatory behavior.

Slip Op. 04-143

FAUS GROUP, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 03-00313

[Cross-motions for summary judgment denied]

November 15, 2004

McKenna Long & Aldridge LLP (*Peter Buck Feller, Daniel G. Jarcho, and Brett Ian Harris*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *Amy M. Rubin*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff, Faus Group, Inc. ("Faus"), challenges the denial of its protest of the liquidation of its laminated flooring panels ("merchandise" or "flooring panels"). The United States Customs Service ("Customs" or "Government")¹ classified the merchandise under heading 4411 of the Harmonized Tariff Schedule of the United States ("HTSUS") (2001) which covers "[f]iberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances." Faus avers that its merchandise should be classified under heading 4418, HTSUS, as "[b]uilders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes." Before the Court are cross-motions for summary judgment pursuant to USCIT Rule 56. The Court has exclusive jurisdiction over this case under 28 U.S.C. § 1581(a)(2000). Because the Court finds that Customs properly classified the merchandise under heading 4411, HTSUS, but the proper subheading cannot be determined, both parties' motions for summary judgment are denied.

UNDISPUTED FACTS

Faus is an importer of laminated flooring panels manufactured from its parent, Industrias Auxiliares Faus S.L., in Spain. Decl.

¹Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. See Homeland Security Act of 2002, Pub. L. No. 107-296 § 1502, 2002 U.S.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32, at 4 (2003).

Juan B. Flores ("Flores Decl.") at para. 3 (Mar. 23, 2004).² The flooring panels are made with a core of fiberboard with a density of between 0.85-.95 g/cm³. *Id.* at para. 5. Across the width of the panels a color photograph of three parallel wood strips is overlaid, with the ends of the parallel strips offset from each other. *Id.* at para. 7. Product Sample, Pl.'s Ex. 1. The overlay is embossed to further simulate the appearance of a natural wood product.³ Flores Decl. at para. 5. The fiberboard core is backed by a reinforced melamine layer. *Id.* The panels are non-structural finished articles ready for installation by end-users. *Id.* at para. 10. Eight panels are packaged together, *id.* at para. 24, and each panel is tongue-and-grooved along all of its edges and ends such that it can be joined with other boards and permanently affixed with the aid of adhesives, *id.* at para. 11. Overall, the product is designed to have a "look, price and performance comparable to traditional wood flooring." *Id.* at para. 9.

SUMMARY OF PARTIES' ARGUMENTS

Faus argues that the imported laminated flooring panels in question should be classified under heading 4418, HTSUS, covering "[b]uilders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes."⁴ Pl.'s Mem. Supp. Mot. Summ. J. at 7-24 ("Pl.'s Mem."), Pl.'s Reply Supp. Mot. Summ. J. ("Pl.'s Reply") at 1-5. Faus contends that the subject merchandise is properly classifiable under heading 4418, HTSUS, because builders' joinery, a term adopted from the Brussels Nomenclature, covers flooring panels prepared with joints for assembly. Pl.'s Mem. at 9-12, Pl.'s Reply at 1. Moreover, it asserts that the plain language of heading 4418, HTSUS, and the Explanatory Notes

²The Government accepts Faus' factual assertions as true for the purposes of the cross-motions of summary judgment, see Def.'s Mem. Supp. Cross-Mot. Summ. J. & Opp'n Pl.'s Mot. Summ. J. ("Def.'s Mem.") at 9, except insofar as to whether Faus' faux flooring is water resistant, see Def.'s Resp. Pl.'s Statement Material Facts at paras. 9-10.

³Because the Court rejects Plaintiff's contention that the merchandise is properly classified in heading 4418, HTSUS, it has no occasion to consider whether Faus' product simulates parquet flooring, and whether simulation of parquet flooring alone is sufficient to classify a product as parquet panels under subheading 4418.30, HTSUS.

⁴ 4418.00	Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes
4418.10	Windows, French-windows and their frames:
4418.20	Doors and their frames and thresholds:
	* * *
4418.30.00	Parquet panels
	* * *
4418.90	Other:

confirm this conclusion. Pl.'s Mem. at 13-14, Pl.'s Reply at 1-2.⁵ Faus denies that the flooring panels can be classified under heading 4411, HTSUS, which covers "[f]iberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances,"⁶ because Note 4 to Chapter 44 provides that "[p]roducts of heading 4410, 4411 or 4412 may be worked to form the shapes provided for in respect of the articles of heading 4409 [which includes tonguing and grooving] . . . or submitted to any other operation provided it does not give them the character of articles of other headings." Pl.'s Mem. at 24-27, Pl.'s Reply at 5-8. Faus claims that because its merchandise has been tongue-and-grooved and surface coated, and these operations give the merchandise the character of builders' joinery, the merchandise cannot be classified under heading

⁵ Since January 1, 1989, products entering the United States are classified according to the Harmonized Tariff Schedule of the United States. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1217, 102 Stat. 1107, 1163 (1988); see 19 U.S.C. § 3001 (1988). The HTSUS is the United States' implementation of the International Convention on the Harmonized Commodity Description and Coding System ("Convention"), 102 Stat. 1107, 1147, which was the culmination of a ten-year effort by the United States and its major trading partners to develop "a single modern product nomenclature for international use as a standard system of classifying goods for customs." Booklet 18 (§ 50.2 Classification of Merch.), 2 Commentary, Customs Law & Admin. (3rd ed. 2004) at 5. Part of this effort required the reconciliation of the Tariff Schedule of the United States, and the Brussels Nomenclature, a common nomenclature adopted by European nations in the 1950s, which were two major influences on the Convention. See Customs Co-Operation Council, *Introducing the International Convention on the Harmonized Commodity Description and Coding System* 13, 19-20 (1987).

To oversee the implementation of the harmonized system, the Convention empowered the Customs Cooperation Council ("CCC"), renamed the World Customs Organization ("WCO") in 1994, to publish explanatory notes "constitut[ing] the official interpretation of the Harmonized System at the International level," *id.* at 36, and to recommend amendments to the nomenclature, Convention Article 16 found at <http://www.wcoomd.org/ie/En/Conventions/conventions.html>. The Explanatory Notes published by the World Customs Organization are amended regularly to help resolve questions as to the proper classification of goods.

⁶ 4411

Fiberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances:

Fiberboard of a density exceeding 0.8 g/cm³:

4411.11.00	Not mechanically worked or surface covered
	* * *
4411.19	Other:
4411.19.20	Not surface covered (except for oil treatment)
	* * *
	Other:
4411.19.30	Tileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of walls, ceilings or other parts of buildings
4411.19.40	Other

4411, HTSUS. See *Id.* Last, Faus asserts that even if the merchandise is classified under heading 4411, HTSUS, it should be classified under subheading 4411.19.30, HTSUS, which covers "[t]ileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of wall, ceilings or other parts of buildings."⁷ Pl.'s Mem. at 27 n.12.

The Government avers that the merchandise is not classifiable under heading 4418, HTSUS, because heading 4418, HTSUS, covers only products specifically mentioned in the heading and other builders' products not covered by other tariff provisions. Def.'s Mem. at 17-19, Def.'s Reply Pl.'s Resp. Def.'s Cross-Mot. Summ. J. at 4-5 ("Def.'s Reply"), Def.'s Resp. Ct.'s Questions Prior Oral Argument Parties' Cross-Mot. Summ. J. at 2-3 ("Def.'s Resp."). The Government claims that Faus' reading of heading 4418, HTSUS, creates conflicts with other headings. *Id.* Moreover, the Government asserts that an interpretation of heading 4418, HTSUS, by a Canadian customs tribunal supports its reading. Def.'s Mem. at 23 n.12.

The Government further asserts that even if the merchandise can be classified under heading 4418, HTSUS, heading 4411, HTSUS, is the more specific and accurate heading for the merchandise. Def.'s Mem. at 29-30. The Government challenges Faus' interpretation of Note 4 to Chapter 44, asserting that the language, "[p]roducts of heading 4410, 4411 or 4412 may be worked to form the shapes provided for in respect of the articles of heading 4409 [which includes tonguing and grooving] . . . or submitted to any other operation provided it does not give them the character of articles of other headings" supports the classification of the merchandise under heading 4411, HTSUS. *Id.* at 9-16, Def.'s Reply at 9-12. More specifically, the Government claims that Faus misconstrues the antecedent to the word "it," which only refers to "any other operation." Def.'s Mem. at 11-12. Therefore, the Government argues, when properly construed, Note 4 indicates that products may be tongue-and-grooved and still remain in heading 4411, HTSUS. *Id.* Last, the Government argues that the merchandise is not tileboard and therefore should be classified under subheading 4411.19.40, HTSUS, the basket provision for "[f]iberboard of a density exceeding 0.8 g/cm³." Def.'s Mem. at 2.

STANDARD OF REVIEW

"The proper scope and meaning of a tariff classification term is a question of law . . . while determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact." *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002)

⁷ Faus and the Government also dispute the proper subheading under heading 4418, HTSUS. Because the Court rejects Faus' arguments that the merchandise is properly classifiable under heading 4418, HTSUS, the Court will not summarize those arguments.

(citations omitted). A Customs classification ruling is subject to *de novo* review as to the meaning of the tariff provision but may be accorded a "respect proportional to its 'power to persuade.'" *United States v. Mead*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Both parties have moved for summary judgment pursuant to USCIT Rule 56. Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue* as to *any material fact* and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c) (emphases added). Material issues only arise concerning "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Consequently, in classification cases, genuine issues of material fact only arise when there is a dispute over the use, characteristics, or properties of the merchandise being classified, *Brother Int'l Corp. v. United States*, 26 CIT ___, ___, 248 F. Supp. 2d 1224, 1226 (2002), or where commercial meaning is in question. *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). For the reasons set forth below, summary judgment for either party at this point is not warranted.

DISCUSSION

"The proper classification of merchandise entering the United States is directed by the General Rules of Interpretation ('GRIs') of the HTSUS and the Additional United States Rules of Interpretation." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). According to the GRIs, a Court must choose the most appropriate heading and then, "[o]nly after determining that a product is classifiable under the heading should the court look to the sub-headings to find the correct classification for the merchandise." *Id.* at 1440 (citing GRI 1, 6, HTSUS). As it is possible that goods may be, "*prima facie*, classifiable under two or more headings," GRI 3, HTSUS, provides additional guidance in choosing between the relevant headings. According to this framework, the Court must first determine the proper heading for the flooring panels.

In this case, the parties have submitted two possible headings under which the merchandise may fall: headings 4411, HTSUS and 4418, HTSUS. Because the applicability of heading 4411, HTSUS, is dependent on the meaning of heading 4418, HTSUS, by virtue of Note 4 to Chapter 44, the Court will first construe heading 4418, HTSUS, and then heading 4411, HTSUS. Because the Court finds that the flooring panels appear to be *prima facie* classifiable under both headings, the Court will next determine which of the two headings is the proper heading for the merchandise. After concluding that heading 4411, HTSUS, is the proper heading for Faus' merchan-

dise, the Court will consider whether Faus' merchandise is "tileboard," ultimately concluding that there are still triable issues precluding summary judgment.

I. Choosing the Proper Heading

A. Heading 4418, HTSUS

The Court first looks to the language of heading 4418, HTSUS. When classifying merchandise, "HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The Court may only set aside the common meanings when so directed by the legislative history,⁸ where a party proves that a term "has a different commercial meaning that is definite, uniform, and general throughout the trade," see *id.* at 1379,⁹ or where application of the common meaning would produce absurd or anomalous results, *Pillowtex Corp. v. United States*, 21 CIT 1154, 1157, 983 F. Supp. 188, 191 (1997).

Heading 4418, HTSUS, covers "[b]uilders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes." Heading 4418, HTSUS. Although the merchandise is made of fiberboard, not wood, Note 3 to Chapter 44 specifies that heading 4418, HTSUS, applies to "articles of the respective descriptions of particle board or similar board, *fiberboard*, laminated wood or densified wood as they apply to such articles of wood." (Emphasis added). Both parties agree that the merchandise comprises neither carpentry of wood¹⁰ nor shingles or shakes.¹¹ Therefore, if the merchandise is to fall within heading 4418, HTSUS, it must be "builders' joinery."

⁸ Neither the parties, nor the Court, have found any Congressional history on heading 4418, HTSUS. Builders' joinery was not part of the Tariff Schedule of the United States and was inserted into the United States nomenclature as part of the United States' adoption of the Harmonized Tariff Schedule.

⁹ There appears to be no commercial meaning for the terms in heading 4418, HTSUS. Dep. of Paul Garretto, Pl.'s Ex. 4 at 113 ("The industry in the United States does not use [the] term [builders' joinery].").

¹⁰ According to the Explanatory Notes, carpentry of wood involves woodwork "used for structural purposes or in scaffoldings, arch supports. . . ." Harmonized Commodity Description and Coding System Explanatory Note 44.18 at 686-87 (2nd ed. 1996) ("Explanatory Notes"). As Faus has agreed that its flooring panels are non-structural, see Flores Decl. at para. 10, the merchandise cannot constitute carpentry of wood. The Explanatory Notes "do not constitute controlling legislative history but nonetheless are intended to clarify the scope of [the] HTSUS [] and to offer guidance" in its interpretation, *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (1994).

¹¹ Shingles are a "[r]oofing material made from wood or other material" and shakes are a "[r]oofing material produced from wood." *Terms of the Trade*, *supra* at 297 & 299 (4th ed. 2000). There is no evidence in the record that the flooring panels are used on roofs.

i. Choosing the proper term:

Both parties have argued, albeit in different ways, that "builders' joinery" is a term of art. A "term of art" is a "word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." *Black's Law Dictionary* 1511 (8th ed. 2004). Consequently, if "builders' joinery" is a term of art, neither searching through dictionaries for the words "builders" and "joinery" may be appropriate nor may definitions provided by common sources be applicable. In considering this question, the Court is mindful that terms of art are generally disfavored. See, e.g., *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1920) ("[T]he plain . . . meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.") (quoting *Lynch v. Alworth-Stephens Co.*, 294 Fed. 194 (8th Cir. 1923), *Campbell v. Merit Sys. Protection Bd.*, 27 F.3d 1560, 1567 (Fed. Cir. 1994), *Amity Leather Co. v. United States*, 20 CIT 1049, 1053-54, 939 F. Supp. 891, 895 (1996); cf. *Carl Zeiss*, 195 F.3d at 1379 (a party must prove "that [a term] has a different commercial meaning that is definite, uniform, and general throughout the trade"). Additionally, in evaluating this question, the Court notes that the Explanatory Notes refer to the term as just "joinery," see EN 44.18, the heading in the Brussels Nomenclature was "[b]uilders' carpentry and joinery," see Pl.'s Mem. at 9, and that there are no dictionary or other definitions of "builders' joinery" as a single term.

Faus argues that "builders' joinery" was a term employed by the Brussels Nomenclature and incorporated into the United States nomenclature upon the adoption of the HTSUS. Pl.'s Mem. at 10-12. Therefore, when heading 4418, HTSUS, was incorporated into the HTSUS, it was incorporated as understood under the Brussels Nomenclature. *Id.* at 10-11 (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). Accordingly, Faus argues that the Court should interpret the provision as it was understood under the Brussels Nomenclature.¹² *Id.* at 11-12. However, Faus fails to point to any definition of these terms as understood under the Brussels Nomenclature that offers any more understanding than the Court has with the current text and Ex-

¹²The Convention requires that each contracting nation "use all the headings and sub-headings" adopted, Convention at Article 3(1)(i), but may create "subdivisions classifying goods beyond the level of the Harmonized System." *Id.* Convention at Article 3(3). For example, in this case, the heading 4411, and subheading 4411.11, HTSUS, for fiberboard with densities over 0.8 g/cm³, are set at the international level, whereas the sub-subheading 4411.19.30, HTSUS, covering tileboard, is a purely domestic creation specific to the United States tariff schedule.

planatory Notes.¹³ Cf. *Lonza Inc. v. United States*, 46 F.3d 1098, 1106 (Fed. Cir. 1995) ("Absent an express definition, however, the court may consult dictionaries, lexicons, scientific authorities, and other such reliable sources in its effort to determine common meaning."). Nor has Faus submitted any evidence that the term obtained a special meaning different than the one employed by common sources.

Alternatively, the Government argues that "builders' joinery," as used in heading 4418, HTSUS, is a term of art that has a meaning specific to the HTSUS. See, e.g., Def.'s Resp. at 2 ("Although, as noted, we do not dispute the definition provided by the Court is appropriate for general purposes, we do not agree that this broad interpretation properly construes the tariff term 'builders' joinery,' which appears only in Heading 4418.") (emphasis in original). The Court does not dispute that a common meaning may be colored by the context in which the word is used. However, there is a distinction between coloring the meaning of a word and creating a new definition of a term specific to the HTSUS which bears little resemblance to the terms in the heading.¹⁴ If a tariff term were to have a specific definition that bears little resemblance to the common meaning of the tariff term, the WCO or Congress most likely would have included a definition in the HTSUS or the U.S. Additional Notes. Cf.

¹³Faus cites to both the Brussels Nomenclature heading 44.23 and the accompanying Explanatory Notes. Pl.'s Mem. at 9-12.

¹⁴At oral argument, the Government maintained that its argument was not a "term of art" argument, rather an argument based on the principle of *in pari materia*. The Government correctly notes that words do gather meaning from context. Accordingly, "[w]here a tariff term has various definitions or meanings and has broad and narrow interpretations, the court must determine which definition best invokes the legislative intent." *Marubeni Am. Corp. v. United States*, 19 CIT 1249, 1253, 905 F. Supp. 1101, 1105 (1995) (emphasis added). However, as the Government admits, it "did not offer any alternative definitions of the general term 'builders' joinery.'" Def.'s Resp. at 1. Consequently, the Government has provided no definition of builders' joinery to prefer without adding language to the HTSUS; the principle of *in pari materia* does not grant a court license to add language to a heading, only to prefer a definition or meaning already existing. Cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (exceptions can be read into unambiguous statutory language only where absurd results would occur otherwise and as a last resort). For example, if the Government wanted to limit builders' joinery by the type of allowable joint, see *infra* at 25-27, or wanted to read in a limitation by virtue of the "including cellular wood panels and assembled parquet panels" clause, the Court would have a textual hook to justify the Government's assertions. (The "including . . . assembled parquet panels" language appears to be addressing itself to heading 4409, HTSUS, which covers "[w]ood (including strips and friezes for parquet flooring, not assembled)," and does not necessarily have direct ramifications for heading 4411, HTSUS; cellular wood panels appear to be classifiable in multiple headings, see Headquarters Ruling ("HQ") 964683 (August 5, 2002), rendering the "including" language important in simplifying the classification of cellular wood panels.) However, the Government has adopted the position that heading 4418, HTSUS, includes "only the products expressly identified in Heading 4418 and builders' products that are either not described in other provisions or that have undergone operations beyond those provided for in other provisions." Def.'s Mem. at 17. This is not a definition but a result and a result not imputable to the words "builders' joinery." The Court uses definitions to arrive at the right result, not vice versa.

Chapter 44, Note 2, HTSUS (defining "densified wood"); Chapter 44, U.S. Note 1(a), HTSUS (defining "wood waste"); Chapter 44, U.S. Note 1(b), HTSUS (defining "standard wood molding"); Chapter 44, U.S. Note 1(c), HTSUS (defining "surface covered"). Likewise, the Explanatory Notes' description of "joinery" in no way supports the Government's proffered definition. See EN 44.18 and *infra* at 19–20. Accordingly, there is no reason to believe that "builders' joinery," as used in the tariff schedule, has a different meaning than the meaning used in common parlance. Therefore, the Court will define the language "builders' joinery" according to the definitions of its two composite words, "builders'" and "joinery."

ii. Defining builders' joinery:

Starting with the word "builders'," dictionaries generally define a "builder" as one who constructs a building. See *II Oxford English Dictionary* 631 (2nd ed. 1989) ("[o]ne who builds; the erector of a building."); *Webster's II New Riverside University Dictionary* 206 (1988) ("[o]ne that builds, esp. a person who contracts for and supervises the construction of a building"); *American Heritage Dictionary* 250 (3rd ed. 1992) (same); J. Stewart Stein, *Construction Glossary* 803 (2nd ed. 1993) ("Individual, company, or corporation who engage [sic] in building construction"); but cf. *Webster's Third New International Dictionary* 292 (1993) ("one that builds: as . . . a worker (as a carpenter, shipwright, or mason) whose occupation is to build.").¹⁵ Because "builders'" is an adjective that modifies "joinery," and builders are involved in the construction of buildings, the addition of the word "builders'" alerts the reader that only those definitions relating to the construction of buildings are relevant. Therefore, the Court deems only definitions of "joinery" involving the construction of buildings relevant and discards those that do not involve the construction of buildings.

Definitions of "joinery" vary slightly more, and are less precise, than the definitions of "builder." The *Dictionary of Architecture and Construction* defines joinery as "[t]he craft of woodworking by joining pieces of wood, esp. of the finish and trim workings of the interior of a structure, such as doors, paneling, sashes, etc., as distinguished from carpentry, which suggests framing and rough work." *Dictionary of Architecture & Construction* 519 (3rd ed. 2000) (emphasis in original). The *Columbia Encyclopedia* similarly defines joinery as the "craft of assembling exposed woodwork in the interiors of buildings." *The Columbia Encyclopedia* (6th ed. 2001) available at <http://www.bartleby.com/65/jo/joinery.html>. *Webster's Third New International Dictionary* defines "joinery" as "the art or trade of a joiner" where a

¹⁵ Given that the definitions, other than Webster's, only include buildings rather than boats or ships, and because the products in this case are clearly for building use, the definitions of the other dictionaries is preferred here.

"joiner" is defined as "a person whose occupation is to construct articles by joining pieces of wood: one who does the woodwork (as doors or stairs) necessary for the finishing of buildings." *Webster's Third*, *supra* at 1219. The *Oxford English Dictionary* defines "joinery" as "[t]he art or occupation of a joiner, the construction of wooden furniture, fittings, etc. . . ." wherein "joiner" is defined as "[a] craftsman whose occupation it is to construct things by joining pieces of wood; a worker in wood who does lighter and more ornamental work than that of a *carpenter*, as the construction of the furniture and fittings of a house, ship, etc." VIII *Oxford English Dictionary*, at 262 (emphasis in original). The *American Heritage Dictionary* defines "joinery" as "1. The art or craft of a joiner: cabinetmaking. 2. work done by a joiner; fine woodwork" where "joiner" is "[a] carpenter, especially a cabinetmaker." *American Heritage*, *supra* at 971. The *Terms of the Trade* defines "joinery" as, "1. A term used in Europe to denote the higher grades of lumber suitable for such uses as cabinetry, millwork, or interior trim. 2. The products made by a joiner," *Terms of the Trade* 186 (4th ed. 2000).

Finally, the Explanatory Note for 44.18 states that:

This heading applies to [1] woodwork, including that of wood marquetry or inlaid wood, [2] used in the construction of any kind of building, etc., [3] in the form of assembled goods or as recognisable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.

EN 44.18 at 686. The Explanatory Note further comments that joinery "applies more particularly to builders' fittings¹⁶ (such as doors, windows, shutters, stairs, door or window frames)." *Id.* The Explanatory Notes are especially helpful in this context because the United States adopted the Customs Cooperation Council's language for heading 4418, HTSUS. *Cf. Pima Western, Inc. v. United States*, 20 CIT 110, 113, 915 F. Supp. 399, 402 (1996) ("Where the United States has adopted headings, subheadings, and related chapter notes verbatim from the CCC's version, the CCC's Explanatory Notes are especially helpful in interpreting the HTSUS, albeit not dispositive.").

From these definitions a general pattern emerges that "builders' joinery" relates to: a) already joined pieces of wood or wood products capable of being joined with joints; b) that the products function as

¹⁶ Fittings are "furnishings or fixtures." *American Heritage*, *supra* at 688.

non-structural elements of a building; and c) that the wood is used as woodworking, i.e., finishing, for the interior of a building.¹⁷

iii. *The Government's Proposed Construction:*

The Government does not offer the Court a definition of builders' joinery. See Def.'s Mem. at 16–23, Def.'s Reply at 4–13.¹⁸ Nor does it “dispute [that] the definition provided by the Court is appropriate for general purposes; [however the Government does] not agree that this broad interpretation properly construes the tariff term ‘builders’ joinery,’ which appears only in Heading 4418.” See, e.g., Def.’s Resp. at 2. Instead, the Government proposes an alternative reading of “builders’ joinery” which covers “[1] only the products expressly identified in Heading 4418 and [2] builders’ products that are either not described in other provisions or [3] that have undergone operations beyond those provided for in other provisions.” Def.’s Mem. at 17. To support its argument, the Government asserts that if the Court uses the common meaning, heading 4418, HTSUS, then heading 4418, HTSUS, will subsume or conflict with other headings, thereby rendering them superfluous or impermissibly redundant. *Id.* at 17–18.¹⁹

¹⁷Faus cites to *Am. Bayridge Corp. v. United States*, 22 CIT 1129, 1142, 35 F. Supp. 2d 922, 932 (1998) to support its definition of builders’ joinery, noting that it was “vacated on other grounds.” Pl.’s Mem. at 16. That case was appealed and the Federal Circuit “vacate[d] that portion of the Court of International Trade’s judgment that relates to the classification of predrilled studs.” *American Bayridge Corp. v. United States*, 21 I.T.R.D. (BNA) 1766, 1767 (Fed. Cir. 1999) (unpublished decision); see also 217 F.3d 857 (Fed. Cir. 1999)). Because the classification portion of the decision was vacated, reliance or citation thereto is precluded.

¹⁸The Government also argues that the instant case is controlled by the Federal Circuit’s decision in *Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262 (Fed. Cir. 2004). Def.’s Mem. at 15. The Government claims that “[g]iven the similarity between the *Boen* merchandise and Faus’s merchandise, this Court should follow the CAFC and classify Faus’s flooring panels in the materials provision, in this case, the ‘fiberboard provision.’” Def.’s Mem. at 15. However, *Boen* dealt with the classification of certain plywood panels under heading 4412, HTSUS. The Federal Circuit did not discuss heading 4418, HTSUS, and the issue was not briefed to this Court. Given that small nuances in language can have dramatic impacts on classifying goods, cf. the discussion below of the word “it,” it is unknowable whether, and to what extent, that decision has implications for this case. However, the Court does note that the Explanatory Note for 44.18 states that “plywood panels, even if surface treated for the purposes of concrete shuttering, are classified in heading 44.12,” and goes on to state that “[t]he heading does not cover: (a) plywood panels or veneered panels, used as flooring panels, which have a thin veneer of wood affixed to the surface, so as to simulate a flooring panel made up of parquet strips. . . .” Explanatory Note 44.18 at 686. There is no similar exclusionary language for fiberboard products.

¹⁹Nor could the Government argue that builders’ joinery includes only those products contained in the Heading and Explanatory Notes. The Explanatory Note reads, in part, “‘joinery’ applies more particularly to builders’ fittings (such as doors, windows. . . .” EN 44.18 at 686 (Emphasis added). The words “such as” clearly state that this is a non-exhaustive list. Cf. *Park B. Smith, Ltd v. United States*, 347 F.3d 922, 928 (Fed. Cir. 2003) (rejecting a similar argument when the text employed the phrase “for example” which is “illustrative and informative, but not limiting.”). By not listing every possible product that may fall within the term builders’ joinery, or including a catch-all, the drafters did not intend that builders’ joinery be a special term of art as defined only in the Explanatory Notes.

The Government's proposed reading of "builders' joinery" is unpersuasive for three reasons. First, what the Government means by "not described in other sections" is uncertain and unworkable. If construed broadly, it means that only cellular wood panels, assembled wood panels, and builders' products not covered by other headings are classifiable under heading 4418, HTSUS. However, Chapter 44 contains a basket provision for "[o]ther articles of wood." Heading 4421, HTSUS; cf. Def.'s Mem. at 18 (claiming that shutters cannot be classifiable under heading 4418, HTSUS, because they are classifiable under heading 4421, HTSUS). Therefore, all wood products are covered by other headings in Chapter 44 (and other chapters). Consequently, there would be nothing left to commit to heading 4418, HTSUS. On the other hand, if "not described in other sections" is meant only to cover those products not specifically named in other provisions, the Government could not prevail here because it seeks to classify Faus' merchandise in a basket provision under subheading 4411.19.40, HTSUS. In other words, Faus' merchandise is "not described in other sections" and therefore would fall under heading 4418, HTSUS, under the Government's own proposed construction. Likewise, the second prong of the Government's proposed reading is problematic. As will be discussed below, what falls within headings 4410, 4411 and 4412, HTSUS, is dependent on the "character of articles of other headings." Chapter 44 Note 4, HTSUS. Because "builders' joinery" would lack any "character" under the Government's reading, Note 4 would not be triggered, rendering all products classifiable according to their input materials under headings 4410, 4411 and 4412, HTSUS.

Second, in an effort to avoid conflicts with other provisions, the Government completely ignores the words actually appearing in heading 4418, HTSUS. The Government's proposed definition essentially seeks to convert "builders' joinery" into "builders' other." This reading is made unlikely by the presence of a basket provision in Chapter 44, i.e., heading 4421, HTSUS. What this suggests is that if the drafters wanted to make heading 4418, HTSUS, a basket provision for builders' products, they knew how to do so without using obscure terms like "builders' joinery." Cf. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 n.9 (2004) ("when it is clear that Congress knew how to specify [a term, i.e., "other"] when it wanted to, [the government's argument] runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" (citing 2A N. Singer, *Statute and Statutory Construction* § 46:06 at 194 (6th ed. 2000))).

Third, contrary to the Government's concern, the Court's reading will not render other provisions nugatory because there are limiting principles in the definition of "builders' joinery." Cf. *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1311 (Fed. Cir. 2003). For example,

the Government is concerned that "decking" would be included within 4418, HTSUS, rather than under headings 4407 and 4409, HTSUS. Def.'s Mem. at 18.²⁰ However, because the definition derived by the Court requires use for interior woodwork or fittings of a non-structural nature, wood intended for decking would not fall under heading 4418, HTSUS. Similarly, the Government expresses concern over the classification of "tileboard" which is currently classifiable under subheading 4411.19.30, HTSUS. *Id.* The definition of builders' joinery requires that products be joined or capable of being joined together with the aid of joints. However, the only form of "tileboard" the Government recognizes has bull-nosed edges,²¹ which prevent the joining together of tileboard panels, thereby excluding them from 4418, HTSUS.²²

Alternatively, the solution may lie in the very nature of the problem itself. Under GRI 3, products are classified under the more specific heading. Accordingly, the more broad a provision is, the less likely it will be the more specific provision. There is no reason why the drafters would not have preferred this solution to cure any defect of heading 4418's, HTSUS, broad scope. *Cf. Intercontinental Marble Corp. v. United States*, 381 F.3d 1169, 1176 (Fed. Cir. 2004). In sum, the Government has offered no sufficient justification to re-write the plain language of the heading.

²⁰The Court also notes that "decking" is not explicitly, or implicitly, mentioned in 4407, HTSUS, or 4409, HTSUS, so there appears no reason why decking must necessarily be classified there. The Government also cites other examples, i.e., worked plywood and veneered panels (heading 4412), shutters (heading 4421), kitchen cabinets (heading 9403), wood molding (heading 4409), coniferous wood (heading 4409) and nonconiferous wood flooring (heading 4409), Def.'s Mem. at 18, Def.'s Reply at 9, and has urged the Court to reconcile these provisions with the proposed definition of heading 4418, HTSUS, Def.'s Resp. at 2-3. Worked plywood and veneered panels are explicitly excepted from heading 4418, HTSUS, according to the Explanatory Notes. *See infra* note 21. Some shutters are used on the exterior of buildings, thereby precluding them from being used on the interior of buildings as required by the Court's definition; moreover, shutters are given as a specific example of builders' joinery by the Explanatory Notes. EN 44.18 at 686. Kitchen cabinets are not mentioned *eo nomine* under heading 9403, HTSUS, but in the non-binding statistical suffixes. *See Pillowtex Corp. v. United States*, 21 CIT 1154, 1157, 983 F. Supp. 188, 191 (1997) ("statistical suffixes are not part of the legally binding, statutory language of HTSUS. Therefore, the inclusion of [the merchandise in controversy] in the statistical suffix to HTSUS 9404.90.80 is irrelevant.") (citing *Pima Western, Inc. v. United States*, 20 CIT 110, 115, 915 F. Supp. 399, 404 (1996)). Moreover, these products, as well as the others, may not be classified under heading 4418, HTSUS, because other headings may be more specific to the particular good. *See infra* at 46-52.

²¹*See Terms of the Trade*, *supra* at 47 ("bullnose" means "[t]he process of rounding an edge of a board used as shelving, stadium seating, stepping, etc.").

²²For instance, JJ Barker's Tileboard product discussed in HQ 960084 as the model for defining "tileboard," has bull-nosed edges which make it incapable of being joined with like products. In fact, installation requires leaving an 1/8" gap between panels for the 100% silicone seams. *See* Installation, <http://www.barker.ca/?section=barkertile&sub=Installation>; *see also* HQ 085913 (January 8, 1990) (discussing Plywood Panels Inc.'s "tileboard").

iv. Nature of the Joints:

Alternatively, the definition of "builders' joinery" may be limited by the type of joints it includes, e.g., that tongue-and-grooved joints may be distinguishable from the types of joints listed as exemplars in the Explanatory Notes. See Def.'s Mem. at 23 n. 12; see also *HFI Hardwood Flooring Inc. v. Deputy Minister of National Revenue*, Appeal No. AP-94-188 (July 17, 1995), Ex. B to Def.'s Mem.²³ The Government argues that because tongue-and-grooved joints are included in heading 4409, HTSUS,²⁴ tongue-and-grooved joints cannot be included within meaning of heading 4418, HTSUS. *Id.*²⁵ First, if tongue-and-grooved joints did not meet the requirements of heading 4418, HTSUS, then including the words "tongued" and "grooved" in heading 4409, HTSUS, would be unnecessary. Second, Customs has consistently classified wood products that were tongue-and-grooved under 4418, HTSUS. See, e.g., NY K82706 (Feb. 20, 2004); NY J87603 (Aug. 18, 2003); HQ 956363 (Sept. 2, 1994); HQ 955712 (Apr. 20, 1994); HQ 952940 (Mar. 24, 1993). In fact, during discussions in the WCO on whether wood products which were tongue-and-grooved along all their edges and ends were classifiable under heading 4409, HTSUS, or heading 4418, HTSUS, the United States maintained that said products should be classified under heading 4418, HTSUS, because heading 4409, HTSUS, only included products tongue-and-grooved along their "edges," not "ends." Def.'s Mem. at 21-22. To resolve this controversy, the WCO amended the Explanatory Notes to

²³ The Canadian Trade Tribunal found that "builders' joinery" had a commercial meaning within Canadian commerce. Because commercial designations must be established for commerce in the United States, where no proof has been offered to support a commercial designation within the United States, the Court is bound by the common meaning of the tariff term. *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1049 (Fed. Cir. 2001) ("in considering the commercial designation of a tariff term, only commercial use of that term in the United States is relevant.").

²⁴ Heading 4409, HTSUS, reads: "Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges, or faces, whether or not planed, sanded or finger-jointed." The 2002 Amendment added the words "and ends" after "edges", and replaced "finger-jointed" with "edge-jointed."

²⁵ By way of comparison, the *Terms of the Trade*, defines a mortise and tenon joint as: "A type of corner joint in which projections, called tenons, on one piece of lumber fit into slots, called mortises, on another piece." *Terms of the Trade*, supra at 218, cf. *Dictionary of Architecture and Construction* supra at 602 ("A joint between two wood members that is formed by fitting a *tenon* at the end of the one member into a *mortise* in the other member. . . .") (emphasis in original). A "dovetail" is an "interlocking joint used in cabinetry." *Terms of the Trade* at 106. Lastly, a "tongue and groove" joint is "[l]umber machined to have a groove on one side and a protruding tongue on the other, so that pieces will fit snugly together, with the tongue of one fitting into the groove of the other." *Id.* at 344; cf. *Dictionary of Architecture and Construction* at 944 ("A joint formed by the insertion of the *tongue* of one member into the corresponding groove of another.").

heading 4411, HTSUS; however, the United States did not acquiesce to this amendment. *Id.* Rather, it was only after the WCO amended heading 4409, HTSUS, that Customs finally classified wood products tongue-and-grooved along their ends in heading 4409, HTSUS, in 2002. *Id.*²⁶ Given that the amendment did not alter heading 4418, HTSUS, and that Customs still classifies some tongue-and-grooved flooring panels under heading 4418, HTSUS, this amendment did not necessarily disqualify fiberboard products having only tongue-and-grooved joints from heading 4418, HTSUS.²⁷ Because of the United States' position before the WCO, its long-standing practice that it still maintains, the fact that the common meanings of the joints involved do not contradict this position, and the Government's apparent unwillingness to support its own argument in briefing subsequent to its initial brief, the Court does not find the Government's attempt to distinguish Faus' product on the basis of its joints meritorious.

v. Applying the law to the facts:

The Court must next determine whether Faus' merchandise has the character and use befitting the term "builders' joinery." Using the definition established above, Faus' merchandise appears to be covered by heading 4418, HTSUS. Faus' flooring is designed to be: (a) assembled from many panels, sold together in sets of eight, and joined together by tongue-and-grooved joints, Flores Decl. at para. 11, 24; (b) used in the construction of a building in a non-structural role, *id.* at para. 10; and (c) as part of the finishing or woodwork of a building, *id.* at para. 9. Accordingly, the Court finds that Faus' merchandise meets the definition of "builders' joinery."

B. Classification Under 4411, HTSUS

The Government contends that even if the merchandise qualifies as builders' joinery, the merchandise is nonetheless more specifically

²⁶ Consequently, any meaning that attached with the amendment is inconsequential to this case as the entries occurred prior to 2002. Pl.'s Mem. at 18-19 n.6, Pl.'s Reply at 4 n.4.

²⁷ Faus claims that this 2002 Amendment informs this case because it signaled that tongue-and-grooved wood should be classified under heading 4409, HTSUS, but left fiberboard under heading 4418, HTSUS. This *expressio unius est exclusio alterius* argument is unpersuasive. The WCO may have just been signaling that it was a mistake to classify tongue-and-grooved products under heading 4418, HTSUS, to begin with, not implicitly ratifying Custom's classification scheme. Given that Faus does not cite any classification cases of fiberboard products raising this issue prior to the 2002 Amendment, heading 4411, HTSUS, may just not have been considered problematic, and therefore warranting amending by the WCO.

classifiable under subheading 4411, HTSUS. Heading 4411, HTSUS, covers "[f]iberboard of wood and other ligneous materials, whether or not bonded with resins or other organic substances."²⁸ Heading 4411, HTSUS, is an *eo nomine* provision as it "describes a commodity by a specific name." *Am. Hardboard Ass'n v. United States*, 12 CIT 714, 715 (1988). Because *eo nomine* "provision[s] include[] all forms of the named article unless limited by [their] terms," *id.*, "[a]n improvement in the merchandise provided for *eo nomine* does not remove it from classification under the *eo nomine* designation." *Arthur J. Humphreys, Inc. v. United States*, 973 F.2d 1554, 1556 (Fed. Cir. 1992). Because Chapter 44 includes not only input materials, like fiberboard, but products made from those input materials, some tension between various headings is unavoidable. *Cf.* heading 4411, HTSUS (covering "Fiberboard of wood or other ligneous materials") with Note 3 to Chapter 44 ("Headings 4414 to 4421 apply to articles of the respective descriptions of particle board or similar board, fiberboard, laminated wood or densified wood as they apply to such articles of wood."). Consequently, to resolve these tensions, the Court has long noted that "although an *eo nomine* provision covers all forms and varieties of the named commodity, there is a point where the addition of parts and functions transforms the object into something else." *Am. Hardboard*, 12 CIT at 716; *see also Humphreys*, 973 F.2d at 1556. The line demarcating heading 4411's, HTSUS, boundary is specified in Chapter Note 4. *See* GRI 1, HTSUS ("[C]lassification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require. . . ."); *cf. Motor Wheel Corp. v. United States*, 19 CIT 385, 388 (1995) (using a chapter note to demarcate the outer boundary of an *eo nomine* provision).²⁹

²⁸ Fiberboard is a "building material made of plant fibers, as wood, bonded together and compressed into rigid sheets." *Webster's II New Riverside University Dictionary* 474 (1988).

²⁹ Faus cites *Arthur J. Humphreys, Inc. v. United States*, 973 F.2d 1554 (Fed. Cir. 1992), *Am. Plywood Ass'n v. United States*, 17 CIT 613 (1993), and *Am. Hardboard*, 12 CIT 714 (1988) for the proposition that "an input material can no longer be classified under the tariff provision describing that input when it has been advanced beyond the basic, fungible material to become a new and different article of commerce." Pl.'s Reply at 9-10 nn. 9, 11-13. However, reliance on this line of cases is misplaced. The Court in *Am. Hardboard*, 12 CIT at 717, found "the legislative history limits the *eo nomine* provision for hardboard to a basic, fungible material." (emphasis added). *Cf. Arthur J. Humphreys*, 973 F.2d at 1561 ("That holding [in *Am. Hardboard*] is consistent with the *Tariff Classification Study*. . .") (emphasis inoriginal); *Am. Plywood*, 17 CIT at 617 (relying on the *Am. Hardboard* test). As the Court in *Am. Hardboard* made clear, "an *eo nomine* provision includes all forms of the named article unless limited by its terms, or contrary to legislative intent, judicial decisions, long standing administrative practice, or demonstrated commercial designation." 12 CIT at 715 (emphasis added). By setting a boundary condition for the *eo nomine* provision in question based on legislative history, the *Am. Hardboard* court was not operating on a common

i. Meaning of Note 4:

Note 4 to Chapter 44 states that "[p]roducts of heading 4410, 4411 or 4412 may be worked to form the shapes provided for in respect of the articles of heading 4409, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular or submitted to any other operation provided it does not give them the character of articles of other headings." When the relevant portions of 4409 are incorporated into this language, Note 4 to Chapter 44 specifies that products included in heading 4411 "may be [tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded,] curved, corrugated, perforated, cut or formed to shapes other than square or rectangular or submitted to any other operation provided *it* does not give them the character of articles of other headings." Note 4 to Chapter 44, HTSUS (emphasis added).

The parties have submitted two competing interpretations of this Note. The Government asserts that subjecting the merchandise to a specifically enumerated operation, regardless of whether that operation may give the merchandise the "character of articles in other headings," does not remove the merchandise from classification under heading 4411, HTSUS. Def.'s Mem. at 11. Rather, only if the merchandise is subjected to "any other operation" should the Court make a determination as to whether that operation gives the merchandise the "character of articles in other headings." *Id.* Faus counters that the proper reading of Note 4 is that the merchandise may be submitted to any of the enumerated operations, or any other operation, so long as none of the enumerated, or other operations, give the merchandise the character of articles in other headings. Pl.'s Mem. at 24-27, Pl.'s Reply at 5-8. Faus argues that tonguing and grooving fiberboard allows panels to be joined together, thereby giving them the character of builders' joinery. *Id.*

These two plausible readings are created by the ambiguous antecedent of the word "it" in Note 4. "It" may refer to just the clause "submitted to any other operation," or alternatively to the entire list. The parties have proposed two schematics of the sentence:

law principle of statutory construction in setting that boundary. *But cf. Permagrain Prods., Inc. v. United States*, 9 CIT 426, 435, 623 F. Supp. 1246, 1253 (1985) (relying on judicial authority to define this dividing line). Although the basic and fungible transformation test may be appropriate where the HTSUS and the legislative history so directs or is ambiguous, where, as here, the text directs a specific test – i.e., the "character of articles of other headings" test – the Court is bound by that test.

GOVERNMENT'S PROPOSED SCHEMATIC ³⁰	FAUS' PROPOSED SCHEMATIC ³¹
[(1)] Worked to form the shapes provided for in respect of the articles of heading 4409, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular or [(2)] submitted to any other operation provided it does not give them the character of articles of other headings.	[1] Worked to form the shapes provided for in respect of the articles of heading 4409, [2] curved, [3] corrugated, [4] perforated, [5] cut or formed to shapes other than square or rectangular or [6] submitted to any other operation provided it does not give them the character of articles of other headings.

Although both readings are possible, the Court finds the Government's position is supported by the plain language and the legislative history of the provision.

The Government's reading is that the "provided it does not give them the character of articles of other headings" clause (hereinafter the "'articles of other headings' clause") is a limitation on the preceding catch-all provision, the "submitted to any other operation" clause. Catch-all provisions are designed "to save the legislature from spelling out in advance every contingency in which the statute could apply." 2A N. Singer, *Statute & Statutory Construction* § 47:17 at 281-82 (6th ed. 2000). As with any general provision, a catch-all provision may be overinclusive unless somehow limited. To cure this defect, courts frequently invoke the canon of statutory construction *ejusdem generis* to limit its scope.³² However, when, as here, there is no apparent pattern discernible from the enumerated operations to serve as a limiting principle, clauses of limitation are necessary. *Cf. Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1097 n.3 (6th Cir. 1986) ("*Ejusdem generis* cannot be applied in a vacuum.") (Keith, J. dissenting). Accordingly, it is reasonable that Congress in-

³⁰ Def.'s Mem. at 11.

³¹ Pl.'s Reply at 5.

³² *Ejusdem generis* is "[a] canon of construction [holding] that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." *Black's Law Dictionary*, *supra* at 556.

tended the "articles of other headings" clause to limit the scope of the catch-all provision.³³

Under Faus' interpretation, the enumerated operations are incidental to the real inquiry: whether the products assume the character of products of other headings. However, when the "articles of other headings" clause is combined with the catch-all provision, the five enumerated operations (or thirteen when the operations of heading 4409 are included) are completely subsumed by the last two clauses.³⁴ Therefore, the list of enumerated operations becomes unnecessary under Faus' reading.

In choosing between two competing interpretations, the Court is mindful of the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). This is especially true here where the drafters went to a great length to specifically enumerate thirteen separate operations to which fiberboard could be subjected. It is unlikely that the drafters would have gone to such great length only to have the entire list subsumed under the catch-all provision. Consequently, given that Faus' interpretation leads to

³³This reading is also supported by the rules of grammar which provide that:

Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.

Anhydrides & Chemicals, Inc. v. United States, 130 F.3d 1481, 1483 (Fed. Cir. 1997) (quoting *C. Dallas Sands, 2A Sutherland Statutory Construction*, 4th ed., § 47.33; cf. *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 362, 382 (1914) ("The natural and grammatical use of a relative pronoun is to put it in close relation with its antecedent, its purpose being to connect the antecedent with a descriptive phrase."). Because "any other operation" is the last sensible antecedent, the qualifying words of the "characters of other headings" clause must modify only "any other operation." Faus has suggested, as a general matter, this rule could lead to absurd results Pl.'s Resp. Ct.'s Questions at 9. However, the Court does not see why an absurd result would occur in this case by applying the rule.

³⁴The only possible reason for the enumeration, under Faus' reading, would be to provide examples of "operations" out of an abundance of caution. Cf. *Ft. Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990) (citing to the principle of *ex abundanti cautela*). However, the listing of thirteen examples would be *ex abundanti cautela ad absurdum*. Faus also asserts that the Court's reading would render the word "fiberboard" nugatory in Chapter Note 3. See Pl.'s Resp. Ct.'s Questions at 7; see also Note 3 to Chapter 44 ("Headings 4414 to 4421 apply to articles of the respective descriptions of particle board or similar board, fiberboard, laminated wood or densified wood as they apply to such articles of wood."). The Court finds Faus' argument unpersuasive for two reasons. First, the only way for Faus' argument to be correct is if, under the Court's reading of Note 4, no fiberboard product could be classified under heading 4418, HTSUS. However, this seems unlikely, especially for products like fiberboard doors or cellular wood panels. Second, Chapter Note 4 is tailored specifically to the problem at issue here, whereas Chapter Note 3 is more general and does not necessarily even implicate the interplay between headings 4411 and 4418, HTSUS. Therefore, if the Court must choose between giving effect to the words in only one Note, the Court should prefer to give precedence to the words which speak directly to the issue at hand, i.e., Note 4. Cf. *Chickasaw Nation v. United States*, 534 U.S. 84, 94-95 (2001).

surplusage, whereas the Government's does not, the Government's interpretation should be preferred.³⁵

This reading is reinforced by looking at the French version of Note 4.³⁶ Like all drafting histories, recourse to the French version cannot supplant "the common, ordinary meaning derived from lexicographical sources." *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1312 (Fed. Cir. 2003). Nevertheless, when the grammar of the English version is ambiguous, looking to the unambiguous French version may be highly probative of the intent of the drafters. *Cf. Cardondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 362, 387 (1914) (looking to the French version of the statute to clarify an ambiguous antecedent).³⁷ As the Supreme Court explained in *Cardondelet Canal*, 233 U.S. at 387, "in French, there is more certain indication of the antecedent" because "[t]here is no neuter gender in the French language, every noun is masculine or feminine, and the pronoun which stands for it must agree with it." In the French version of Note 4, the "it" appears as "celle-ci" which is both feminine and singular. As "sournis a toute autre ouvraison" (or any other operation) is feminine

³⁵The Government asserts that textual clues from Chapter 44 support its reading. Subheading 4411.29.20 covers fiberboard that is "[t]ongued, grooved or rabbetted continuously along any of its edges and dedicated for use in the construction of walls, ceilings or other parts of buildings." Def.'s Mem. at 14-15. The Government argues that Faus' interpretation would render this subheading a nullity as all products under this subheading would be subsumed by heading 4418, HTSUS, such that the subheading would become surplusage. *Id.* Similarly, subheading 4410.32.00, which covers particle board "surface-covered with melamine-impregnated paper," would likely become a meaningless provision as well. However, these subheadings could be preserved in at least three alternative ways: (1) the products are not builders' joinery; (2) that the operations do not give the products the character of articles of other headings; or (3) due to the Government's reading of "it" in Note 4. Nonetheless, the Government is right in noting that at some point Faus' theory does break down. Faus claims that looking to subheadings, before the proper heading is chosen, is precluded by *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). *See, e.g.,* Pl.'s Resp. Ct's Questions at 2 n.1. The mistake committed by the trial court in *Orlando Food* was to classify goods only according to subheadings, rather than headings, violating GRI 1 and 6. In contrast, here the Government only seeks to inform the meaning of the headings using canons of construction such as *noscitur a sociis* (known by its associates) and the canon seeking to avoid absurd results, i.e., rendering subheadings nugatory. Moreover, if it is assumed that Congress created subheadings in which to classify products, then the subheadings must reflect Congressional understanding of the terms of the headings.

³⁶The French provision is as follows: "Les produits des n°s 44.10, 44.11 ou 44.12 peuvent être travaillés de manière à obtenir les profils admis pour les bois du n° 44.09, cintrés, ondulés, perforés, découpés ou obtenus sous des formes autres que carrée ou rectangulaire ou sournis à toute autre ouvraison, pour autant que celle-ci ne leur confère pas le caractère d'articles d'autres positions."

³⁷As discussed above, because the Harmonized Schedule was intended as a uniform system used by many nations, Customs Co-Operation Council, *supra* at 22, it was drafted in English and French, both versions "being equally authentic," Convention, Article 20. Accordingly, the French and English were intended to be identical.

and singular, any other operation appears to be the antecedent to the word "it."³⁸

ii. Faus's Objections:

Faus directs the Court to the Explanatory Notes, which it claims clarifies the ambiguity. Pl.'s Reply at 6. The Explanatory Note to 44.11 states:

The products of this heading remain classified herein whether or not they have been worked to form the shapes provided for in respect of the goods of heading 44.09, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular and whether or not they have been surface or edge worked, or coated or covered (e.g., with textile fabric, plastics, paint, paper or metal) or submitted to any other operation, *provided these operations* do not thereby give such products the essential character of articles of other headings.

Explanatory Note 44.11 (emphasis added to "these operations"). Faus argues that the Explanatory Notes' choice of the word "these," clarifies the word "it" in the Chapter Note. Pl.'s Reply at 6. By using the word "these," Faus contends, the "articles of other headings clause" must refer to multiple operations.

The text of the Explanatory Note has four major variances from Note 4: (1) the Explanatory Note adds "and whether or not they have been surface or edge worked, or coated or covered (e.g., with textile fabric, plastics, paint, paper or metal)"; (2) the inclusion of a comma after "other operation" and before "provided"; (3) the change from "it" to "these"; and (4) the addition of the word "essential" before the word "character." Unfortunately, the "these" is plagued by as many ambiguities as the "it." "These operations" has three possible antecedents; "these" may refer (a) to each of the enumerated operations and catch-all provision; (b) to the surface and edge worked, covered, coated and the catch-all provision;^{39,40} or (c) to just the catch-all pro-

³⁸Faus cites the Declaration of Marc Wilmet, an Emeritus Professor at the Free University of Brussels (Faculty of "Philosophie et Lettres") suggesting that the word "manière" (manner) could also, and in his view more likely, be the antecedent to "celle-ci." Decl. Marc Wilmet, Ex. B to Pl.'s Resp. Ct.'s Questions. However, "manière" (manner) does not appear to be a key word in the French version, which is especially evidenced by the fact that the word "manière" does not have an equivalent in the English version. In other words, according to Professor Wilmet's translation, a non-existent word would be the antecedent in English.

³⁹As of 1995, the Explanatory Note and Chapter Note employed the same language. Then in 1995, the language of the Explanatory Note changed after an inquiry of the Lebanese Delegation to the WCO as to certain particle board strips, grooved on their edges and covered with laminated plastic which were to be used for self assembly into drawers. See Harmonized System Committee, World Customs Organization, *Doc. 39.581 E* (Sept. 28, 1995); Harmonized System Committee, World Customs Organization, *Doc. 39.552 E* (Sept. 20, 1995). Upon the request of the United States, the Secretariat was asked to prepare "suitable amendments to the Explanatory Notes to heading 44.10 for consideration by the

vision. All three readings would justify the substitution of the word "these" for "it." Because the Explanatory Notes "do not constitute controlling legislative history but nonetheless are intended to clarify the scope of [the] HTSUS [] and to offer guidance" in its interpretation, *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (1994), their use is defeated when the Explanatory Notes are as, or more, ambiguous than the text. Consequently, the Explanatory Notes cannot assist the Court's inquiry. *Cf. Stadelman*, 242 F.3d at 1048 ("To determine the meaning of a tariff classification term, only the term used in the tariff classification may be analyzed.").

Faus also points to *Motor Wheel Corp. v. United States*, 19 CIT 385 (1995) to support its position. Pl.'s Mem. at 24. In *Motor Wheel*, the Court interpreted Chapter Note 72(1)(k) which provides:

Flat-rolled products of a shape other than rectangular or square, of any size, are to be classified as products of a width of 600 mm or more, *provided that they do not assume the character of articles or products of their headings*.

Motor Wheel, 19 CIT at 388 (emphasis in original). Note 72(1)(k) has an exclusionary nature – it excludes products from an *eo nomine* provision once they assume certain characteristics. Faus is correct in noting that Note 72(1)(k) is similar to Note 44(4) in that it establishes the boundary for an *eo nomine* provision. However, it does not necessarily follow that the two notes set that boundary in the same way. The HTSUS uses many different types of provisions to help lo-

Working Party to clarify the extent to which products could be covered with plastics, etc., and still remain classifiable in that heading." *Doc. 39.552 E* at para. 5. Because Chapter Note 4 covers both 4410 and 4411, HTSUS, the Explanatory Notes for both were amended. Therefore, as the amendment was intended to cover these contingencies, reading (b) is probably best supported by the legislative history. Consequently, the WCO decided the particle board drawers should remain in 4410, HTSUS. *Doc. 39.581 E* at para. 4.

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OTHER POSSIBLE READING	FAUS' PROPOSED SCHEMATIC
<p>[1] Worked to form the shapes provided for in respect of the articles of heading 4409, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular <i>and</i></p> <p>[2] whether or not they have been surface or edge worked, or coated or covered (e.g., with textile fabric, plastics, paint, paper or metal) or submitted to any other operation, provided these operations do not thereby give such products the essential character of articles of other headings.</p>	<p>[1] Worked to form the shapes provided for in respect of the articles of heading 4409,</p> <p>[2] curved,</p> <p>[3] corrugated,</p> <p>[4] perforated,</p> <p>[5] cut or formed to shapes other than square or rectangular and whether or not they have been surface or edge worked, or coated or covered (e.g., with textile fabric, plastics, paint, paper or metal)</p> <p><i>or</i></p> <p>[6] submitted to any other operation, provided these operations do not thereby give such products the essential character of articles of other headings.</p>

cate goods in a particular heading. Besides an exclusionary form, the HTSUS also employs chapter notes with a more inclusionary character. For example, Note 6 to Chapter 85 states that "[r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they entered with the apparatus for which they are intended." Chapter 85, Note 6, HTSUS. The language, "remain classified," suggests that goods remain in a particular heading even if they may assume the character, i.e., entering with apparatus, of other headings. The question in this case is which of the two forms did the drafters employ in Note 4? The drafters may have intended Chapter Notes 44(4) and 72(1)(k) to accomplish the same ends, or Congress may have intended the catch-all provision to follow the 72(1)(k) form but the enumerated operations to follow the 86(6) form. *Motor Wheel* does not assist the Court in resolving this question, and the Court's construction of Note 4 stands in opposition to the 72(1)(k) form. Therefore, reliance on *Motor Wheel* is misplaced.

iii. Applying Note 4:

Given that the Court deems that "the character of articles of other headings" test only applies to the catch-all provision, only operations not listed within Chapter Note 4, and which give products the character of articles of other headings, exclude a product from heading 4411, HTSUS. Therefore, tonguing and grooving fiberboard, per se, does not render the merchandise unclassifiable under heading 4411, HTSUS.

Faus asserts that even under this restricted reading its merchandise is still not classifiable under heading 4411, HTSUS. Pl.'s Reply at 7 n.7. Faus claims that a "top layer or wear layer, consisting of a combination of corundum and melamine, must be added to the Faus products to make them fit for their intended use"; therefore, its merchandise has been subjected to an "other operation." *Id.* Because Faus submits that its merchandise has been subjected to an "other operation," Note 4 next requires that this operation give the merchandise the "character of articles of other headings." Chapter 44, Note 4, HTSUS.

The word "character" admits of many degrees. An operation may give the product "any character," i.e., an operation that transforms a product into fiberboard which thereby gives the product the character of articles in heading 4418, HTSUS, by virtue of Note 3 to Chapter 44; or "a necessary character," i.e., an operation that gives a product one of the required attributes in another heading; or the "essential character," i.e., an operation which gives a character which differentiates articles of other headings. In deciding which of these alternatives to choose, the Explanatory Notes offer guidance. Specifically, the Explanatory Notes direct that fiberboard articles may remain classifiable under heading 4411, HTSUS, "whether or not they have been surface or edge worked, or coated or covered (e.g.,

with textile fabric, plastics, paint, paper or metal) or submitted to any other operation, *provided* these operations do not thereby give such products the *essential character* of articles of other headings." EN 44.11(emphasis added).

Significantly, the Explanatory Notes for heading 4411, HTSUS, specify that "[i]mpregnating or other agents may also be added during or after manufacture of the board to give an extra property, e.g. impermeability to water or resistance to rot, insect attack, fire or the spread of flame." See EN 44.11; see also Chapter 44, Additional U.S. Note 1(c), HTSUS ("The term 'surface covered,' as applied to articles of headings 4411 and 4412, means that one or more exterior surfaces of a product have been treated with creosote or other wood preservatives, or with fillers, sealers, waxes, oils, stains, varnishes, paints or enamels, or have been overlaid with paper, fabric, plastics, base metal, or other material.").⁴¹ In other words, products of heading 4411, HTSUS, may be surface covered. Because surface covering does not, by itself, give a fiberboard product a character differentiating it from articles under heading 4411, HTSUS, this operation cannot give it "the essential character of articles of other heading." Cf. *Doc. 39.552 E* at para. 5 (discussed *supra* at note 40).

C. Choosing the Proper Heading

Because the merchandise appears to be *prima facie* classifiable under two headings, the Court must now decide which is the preferred heading. Under GRI 1, HTSUS, goods should first be classified according to the terms of the headings and relevant chapter notes. *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 928 (Fed. Cir. 2003) ("Rule 3(a) is applied after the prior rules, and does not override any section or chapter notes."). However, if this is insufficient, GRI 3, HTSUS, provides an additional set of rules for choosing between possible headings. *Orlando Food*, 140 F.3d at 1441.

*i. GRI 1 Analysis.*⁴²

⁴¹ During oral argument, Faus attempted to differentiate lamination from other types of surface covering because lamination was a sophisticated process. Although the Court does not deny that the lamination process used by Faus may be sophisticated, the fact that it is sophisticated does not transform the operation into anything more than covering a fiberboard product with paper, i.e., a color photograph of wood strips, see *Flores Decl.* at para. 5, and then with a melamine (or plastic) layer, *id.*

⁴² Faus has argued that Note 4 to Chapter 44 makes heading 4411, HTSUS, "mutually exclusive" with other provisions in the HTSUS. Pl.'s Mem. at 24. However, for the reasons set forth in this subsection, Faus' reading is not entirely accurate as a matter of law. This analysis further undermines the significance Faus places on Note 4 as being dispositive of how products are allocated among the headings in Chapter 44.

Faus has expressed concern that the Court's reading of Note 4 to Chapter 44 may upset the classification of fiberboard dashboards under heading 8708, HTSUS. Dashboards are not described *eo nomine* under heading 8708, HTSUS. Moreover, because Note 4 does not require that products classifiable under heading 4411, HTSUS, not be classifiable elsewhere, products may be classified in other headings if GRI 3 so directs.

Looking first to the relevant headings and chapter notes, Chapter Note 4 is the only possible candidate for directing the classification of products between the relevant headings. As discussed above, Chapter Note 4 instructs that the "[p]roducts of heading 4410, 4411 or 4412 *may be worked* . . ." ⁴³ (emphasis added). Courts have long noted that the language of a heading or chapter note may direct that one tariff provision takes precedence over any conflicting tariff provisions under the doctrine of invasive language. See, e.g., *American SF Products, Inc. v. United States*, 61 Cust. Ct. 257, 262 (1968) (headnotes containing an invading character eliminate relative specificity from consideration); *Swiss Manufactures Ass'n., Inc. v. United States*, 39 Cust. Ct. 227, 237 (1957) (one provision may take precedence over every other provision of the tariff act). However, as the court in *Swiss Manufactures* noted, the doctrine of invasive language "has never been applied except in cases where the language of the invading provision 'is so sweeping, clear, and definite as to the goods subjected to its operation that there is no room for interpretation as to the goods which Congress meant to include.'" *Swiss Manufactures*, 39 Cust. Ct. at 237 (quoting *Kayser & Co. (Inc.) v. United States*, 13 Ct. Cust. App. 474, 479 (1925)). The court went on to provide examples of invasive language such as: "whether or not more specifically provided for elsewhere, or 'by whatever name known,' and to 'wherever use applied, and whether or not named, described, or provided for elsewhere in this Act.'" *Id.* (citations omitted). When viewed under this framework, given the equivocal connotation of the word "may," the language "may be worked . . ." is insufficient to constitute a clear statement of Congressional intent to have 4411, HTSUS, take precedence over competing headings. Cf. *Pillowtex*, 21 CIT at 1157, 983 F. Supp. at 191.

ii. *GRI 3 Analysis:*

Because GRI 1 is not dispositive, the Court must look to GRI 3, HTSUS, to provide additional guidance. According to GRI 3(a), "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." Under this so-called rule of relative specificity, a court looks to "the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). ⁴⁴

⁴³ Chapter 44 Note 4, HTSUS. The Explanatory Note for 44.11 uses slightly different language: "The Products of this heading *remain* classified herein whether or not" they have been submitted to certain operations. Because the language of the Chapter Note and Explanatory Note covers the same material, but in a different manner, the language of the Chapter Note must govern.

⁴⁴ In conducting this inquiry the Court holds that Faus' flooring panels are not "assembled parquet panels." The *Oxford English Dictionary* defines "assemble" as "[t]o put to-

As discussed above, heading 4418, HTSUS is quite broad, covering everything from assembled parquet panels, to structural beams, to shingles and shakes. Although it is not a basket provision, it covers a myriad of products with only one commonality: the products are used in the construction of buildings. Moreover, it includes products that can be joined by a wide variety of joints and other means. Additionally, products under heading 4418, HTSUS, may be made from "particle board or similar board, fiberboard, laminated wood or densified wood." Note 3 to Chapter 44.

In contrast, products falling under heading 4411, HTSUS, are limited to fiberboard, i.e., boards and panels, by Chapter Note 4. Cf. EN 44.11 ("Impregnating or other agents may also be added during or after manufacture of the *board*. . .") (emphasis added). Because of Chapter Note 4, fiberboard products may only be given certain types of joints without rendering them classifiable elsewhere. For example, if fiberboard is actually joined with other pieces of fiberboard or wood, this "joinery" would be subjected to an "other operation," i.e., being joined with glue or nails, etc., which most likely would give the fiberboard product the character of articles of other headings. What this means is that there are few transformations to which fiberboard may be subjected and remain classifiable under heading 4411, HTSUS. Accordingly, heading 4411, HTSUS, is limited in the types of products it includes to unjoined fiberboard boards and panels. This description much more closely resembles the flooring panels in question than "builders' joinery." Cf. *Russ Berrie & Co., Inc. v. United States*, 381 F.3d 1334, 1337-38 (Fed. Cir. 2004).

Faus argues, *inter alia*, that heading 4418, HTSUS, is more specific because it is more difficult to satisfy, i.e., a product must meet

gether (the separately manufactured parts of a composite machine or mechanical appliance.)" 1 *Oxford English Dictionary*, *supra* at 705; see also *Webster's II New Riverside University Dictionary* 131 (1988) ("Assemble" means "[t]o fit or join together the parts of."). The flooring panels, as imported, are not made from parquet strips which have been "put together." Rather, the panels only have this appearance due to a color photograph of wood flooring which is imposed upon a piece of fiberboard. This reading is exemplified by two aspects of the text. First, the definition of builders' joinery requires either that the products be assembled or have joints for assembly. Because parquet panels are assembled, they fall under heading 4418, HTSUS, regardless of their type of joint. For example, EN 44.18 specifically notes that assembled parquet panels may be tongue-and-grooved, excepting them from heading 4409, HTSUS, which specifically includes wood products which are tongue-and-grooved. Second, the term "assembled parquet panels" is specifically contrasted with the term "unassembled parquet panels" in heading 4409, HTSUS. This distinction reveals that a degree of woodworking, i.e., that which is required to assemble parquet strips, is mandated to render a product an assembled parquet panel. Moreover, Faus' reliance on GRI 2(a) is misplaced. GRI 2(a) states that "[a]ny reference in a heading to an article shall be taken to . . . include a reference to that article complete or finished, . . . entered unassembled or disassembled." However, GRI 1 limits the scope of GRI 2 to only those situations where "such headings or notes do not otherwise require." Here, the term "assembled" in heading 4418, HTSUS, especially as contrasted by the term "unassembled" in heading 4409, HTSUS, clearly indicates that heading 4418, HTSUS, only covers assembled parquet panels.

the three-prong test for builders' joinery. Pl.'s Resp. Ct.'s Questions at 12. Faus attempts to read the court's language in *Orlando Food*, i.e., "the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty," as proposing that the more difficult provision to satisfy is necessarily the more specific. Pl.'s Resp. Ct.'s Questions at 12-13.⁴⁵ However, the Court does not read the *Orlando Food* test as supporting this proposition. First, difficulty is not measured by the number of requirements in the definition of the heading, but the relative particularity thereof.⁴⁶ Cf. *Mitsui Petrochemicals (Am.), Ltd. v. United States*, 21 CIT 882, 888 (1997) (subheading 3811.29.20 embodies "a smaller number of compounds since it has requirements that are 'more difficult to satisfy'"), *Dollar Trading Corp. v. United States*, 64 Cust. Ct. 153, 157-58 (1970) ("because a multitude of hand-operated articles of varying types and designs can be classified under the provisions for hand tools while only a few types of articles . . . are capable of satisfying the requirements of the brush provisions," the latter described heading is more difficult satisfy); cf. *United States v. Siemens Am., Inc.*, 68 CCPA 62, 70 (1981). Although the heading with more requirements may in some cases be the more specific, this proposition does not necessarily hold true in all cases.

⁴⁵ At oral argument, Faus argued that the relative specificity analysis was predicated on the "more difficult to satisfy" test.

⁴⁶ In relevant part, GRI 3 specifies that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." The "relative specificity analysis," as construed by U.S. Courts, is an outgrowth of General Headnote 10(c) of the TSUS, which in turn was a codification of a "judicial aid to construction" developed by U.S. Courts in the latter half of the nineteenth century to prefer the most specific heading in classifying goods. See *Arthur v. Stephani*, 96 U.S. 125, 126-27 (1877), *Homer v. The Collector*, 68 U.S. 486, 490 (1863); see also *Mitsui Petrochemicals*, 21 CIT at 886-87 (providing a good history of the relative specificity analysis). This rule was described most clearly in *Fink v. United States*, 170 U.S. 584, 587 (1898) which stated: "The rule [of relative specificity] is that [], if possible, [the preferred heading] is to be determined by ascertaining whether one of the two paragraphs is more definite in its application to the article in question than is the other."

Later, the "more difficult to satisfy" formulation originated in *United States v. Electrolux Corp.*, 46 CCPA 143 (1959). Relying on *Fink*, the court in *Electrolux Corp.* compared the breadth of two competing provisions holding that a provision was "more specific because it [was] less easily satisfied." *Electrolux Corp.*, 46 CCPA at 148. This language was characterized by the court in *United States v. Simon Saw & Steel Co.*, 51 CCPA 33, 40 (1964) as standing for the proposition that "the more specific provision is the one having requirements which are more difficult to satisfy" - the articulation of the rule of relative specificity on which Faus relies. The Court in *Simon Saw & Steel* did not discuss the principles of this test nor announce that it was breaking new ground. Rather, the court maintained that the "less specific" provision covered "cutting tools of any description or any kind, and in fact lists six different kinds of cutting tools in its first provision . . . The common (dictionary) meaning of the named cutting tools includes a great many different types." *Id.* at 41. In contrast, the more specific provision included "only one article [] capable of qualifying as a circular saw." *Id.*

Given this history, it is apparent that the "difficult" was not meant to be a separate or distinct test from the "accuracy and certainty" test; and there is no indication that the more "difficult to satisfy" test was meant to trump concerns of accuracy and certainty.

For example, in this case as contrasted with *Orlando Food*, the input provision, i.e., heading 4411, HTSUS, is limited by Note 4; to wit, Note 4 places a cap on the products classifiable therein. Accordingly, this makes heading 4411, HTSUS, restrictive in the types of products it covers. It is not an open-ended provision like the one deemed "less specific" in *Orlando Food*. Moreover, the specific requirements of heading 4411, HTSUS, describe the flooring panels with greater accuracy than heading 4418, HTSUS.

Second, by virtue of Note 4, there is more certainty that Faus' flooring panels are classifiable under heading 4411, HTSUS. As Chapter Note 4 specifies, articles of heading 4411, HTSUS, may be tongue-and-grooved; this provides some certainty as to the classification of tongue-and-grooved products therein.⁴⁷ In contrast, there is no certainty that tongue-and-grooved products necessarily even fall under heading 4418, HTSUS. Faus' reading of the *Orlando Food* test would, in this case, place the "certainty" and "difficulty" prongs of the test in tension.⁴⁸

Third, Faus cites to the principle that a "use" provision trumps an *eo nomine* provision under a relative specificity analysis. Pl.'s Resp. Ct.'s Questions at 14-17.⁴⁹ As the case law reveals, this principle is only a "rule of thumb" and should only be employed when the two tariff headings sit in equipoise. *Carl-Zeiss, Inc. v. United States*, 195 F.3d 1375, 1380-81 (Fed. Cir. 1999), *Simon Saw & Steel Co.*, 51 CCPA at 40. Because the Court finds that heading 4411, HTSUS, is more specific, the two competing provisions do not sit in equipoise.

Accordingly, the Court deems that heading 4411, HTSUS, is the more specific heading and therefore the heading under which Faus' merchandise is classified.

⁴⁷ If fiberboard products are given mortise and tenon or dovetail joints, the fiberboard would be submitted to an "other operation" rendering them classifiable under heading 4418, HTSUS (or elsewhere if the circumstances so warranted). In contrast, given the Court's construction of Note 4, tongue-and-grooved products may be classified under heading 4411, HTSUS. Accordingly, this gives some certainty regarding the type of joints products classifiable under 4411, HTSUS, may have.

⁴⁸ Faus has admitted that headings covering input materials may be more specific than builders' joinery. For example, the means by which Faus reconciles the placement of tongue-and-grooved products under heading 4409, HTSUS, with its proposed construction of Chapter 44, is to suggest that heading 4409, HTSUS, is the more specific provision. Pl.'s Mem. at 19-20, Pl.'s Reply at 4. By virtue of the Court's construction of Note 4, heading 4409 and heading 4411 bear many similarities, including the fact that their products may be tongue-and-grooved. Therefore, there is no reason that a different result should obtain. The Court further notes that this may be the purpose of Chapter Note 4, i.e., to align the outer boundaries of headings 4410-4412, HTSUS, with heading 4409, HTSUS.

⁴⁹ At oral argument, the Government disputed that heading 4418, HTSUS, was a use provision. The Court does not express an opinion on this issue.

II. Choosing the Proper Subheading

Relying on the outcome in *Witex, USA, Inc. v. United States*, slip op. 04-144 (CIT Nov. 15, 2004), a companion case dealing with the classification of similar panels under heading 4411, HTSUS, the parties did not independently brief under which subheading Faus' merchandise would fall if the panels were classifiable under heading 4411, HTSUS. Because the Court in *Witex* held that neither party had sufficiently established a commercial meaning for "tileboard" at the summary judgment phase, the Court did not resolve the meaning of "tileboard." Accordingly, because the Parties here have incorporated the arguments from *Witex* by reference, the inability of the Court in *Witex* to resolve issues on the summary judgment applies to the record in this case. Therefore, for the reasons stated in *Witex*, summary judgment is inappropriate.

CONCLUSION

Because the Court finds the record insufficient to establish a commercial designation for the term "tileboard," or exclude the possibility thereof, the cross motions for summary judgment are denied. The parties shall jointly prepare an order governing preparation for trial and submit it to the Court by December 15, 2004.

Slip Op. 04-144

WITEX, U.S.A., INC., ET AL., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Consol. Court No. 98-00360

[Cross motions for summary judgement denied.]

Decided: November 15, 2004

Aitken Irvin Berlin & Vrooman, LLP (Bruce Aitken, Bruce de Grazia, and Virginie Lecaillon (consultant)) for the Plaintiff.

Neville Peterson LLP (Maria E. Celis and John M. Peterson) for the Amicus Curiae in support of Witex U.S.A., Inc., et al., Congoleum Corporation.

Peter D. Keisler, Assistant Attorney General, Barbara S. Williams, Attorney in Charge, International Trade Field Office, Amy M. Rubin, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Yelena Slepak, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: This case involves the proper meaning of the term "tileboard" as used in subheading 4411.19.30 of the Harmonized Tar-

iff Schedule of the United States (1997) ("HTSUS"). Plaintiffs Witex, U.S.A., Inc. and Mannington Mills ("Witex") challenge the United States Customs Service's¹ ("Customs" or "Government") liquidation of its laminated flooring panels ("merchandise" or "flooring panels"), claiming that the merchandise should be liquidated as "tileboard" under heading 4411.19.30, HTSUS, and therefore duty free.² The Government avers that Witex's product is not "tileboard" and therefore should be classified under a basket provision for fiberboard with a density greater than 0.8 g/cm³, and Witex's merchandise should be assessed a duty of 6% *ad valorem*. See subheading 4411.19.40, HTSUS. Before the Court are cross motions for summary judgment pursuant to USCIT Rule 56. The Court has exclusive jurisdiction over this case. See 28 U.S.C. § 1581(a)(2000). Finding material issues in dispute, the Court denies both motions for summary judgment.

BACKGROUND

Witex, U.S.A., Inc. is an importer of laminate panels from its parent, Witex GmbH, a German Corporation. Pl.'s Consol. Compl. ("Compli.") at para. 4(a). Mannington Mills, Inc. is a U.S. company which also imports laminate panels from Witex, GmbH. Pl.'s Consol. Compl. at para. 4(b). This case involves a protest by Witex from 1995 covering one entry,³ and two protests by Mannington Mills from 1996 covering ten entries.⁴

¹ Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. See Homeland Security Act of 2002, Pub. L. No. 107-296 § 1502, 2002 U.S.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32, at 4 (2003).

² 4411 Fiberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances:

Fiberboard of a density exceeding 0.8 g/cm³:

4411.11.00 Not mechanically worked or surface covered

* * *

4411.19 Other:

4411.19.20 Not surface covered (except for oil treatment)

* * *

Other:

4411.19.30 Tileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of walls, ceilings or other parts of buildings

4411.19.40 Other

³ This protest covers Entry No. 471-0953408-2. Pl.'s Compli. at para. 1(a); Pl.'s Mem. Opp'n Def.'s Cross-Mot. Summ. J. ("Pl.'s Resp.") at 2; see also Def.'s Reply Pl.'s Resp. Def.'s Cross-Mot. Summ. J. ("Def.'s Reply") at 3 & n.14.

⁴ As stated by Witex's Complaint, the Mannington challenges involve (1) Ruling on Protest No. 1001-99-105507 covering Entry Nos. D82-0981523, D82-0981640, D82-0981765, D82-0981788, D82-0981856, and D82-0981985 and (2) Ruling on Protest No. 1001-99-105508 covering Entry Nos. D82-0982266, D82-0982541, D82-0982760, and D82-0982837.

Despite the requirements of USCIT Rule 56, the parties have agreed to few relevant facts. The panels at issue consist of a fiberboard core with a density 0.891 g/cm^3 , Mem. from Nick Zerebecki, Mannington Mills, to Hao Chen, Mannington Mills, *Witex Laminate Products*, Ex. 2 to Pl.'s Mem (February 14, 1997) ("Mannington Mem."), Def.'s Statement Additional Material Facts ("Def.'s Statement") at para. 3, and are tongue-and-grooved along their edges and ends.⁵ Def.'s Resp. Pl.'s Statement Material Facts at para 1. The tops of the panels are coated with melamine and aluminum oxide, Mannington Mem. at 1, Def.'s Statement at para. 3, and the panels may be used on floors.⁶ Pl.'s Mem. at 7 para. 19, Def.'s Statement at para. 1.

SUMMARY OF ARGUMENTS

Witex argues that its flooring panels are not fiberboard products and therefore cannot be classified under heading 4411, HTSUS. More specifically, Witex argues that fiberboard, by definition, is limited to unfinished products, whereas its merchandise is finished. Pl.'s Mem. at 11-14, Pl.'s Resp. at 4, Pl.'s Reply in Supp. of Mot. for Summ. J. ("Pl.'s Reply") at 4. Alternatively, Witex asks the Court to consider the arguments made in a companion case, *Faus Group, Inc. v. United States*, slip op. 04-143 (CIT Nov. 15, 2004), that the flooring panels are properly classified under heading 4418, HTSUS, covering "[b]uilders' joinery and carpentry of wood." Pl.'s Mem. at 25, Pl.'s Resp. at 19-20, Pl.'s Reply at 14-15.⁷

Summons Mannington Mills, at 1,3 (Mar. 21, 2000), Summons Witex at 1 (Feb. 13, 1998). Because Witex did not include Entry No. 82-0980133 within its Summons, Summons Witex at 1 (Feb. 13, 1998), this entry is not properly before the Court, Pl.'s Answers Ct.'s Questions Pursuant Order Dated Sept. 20, 2004 at 1.

⁵The Court notes the Government's objection as to whether Witex has sufficiently proved the identity of its merchandise, i.e., to which type of panels, or from what collection, the contested merchandise belonged. Def.'s Reply at 4 n.18. The cases the Government cites, *Group Italglass, U.S.A., Inc. v. United States*, 16 CIT 763, 765, 798 F. Supp. 727, 728 (1992) and *Fabil Mfg. Corp. v. United States*, 25 CIT 514, 517 (2001)(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), do establish that the burden of proof is on the plaintiff in establishing the identity of the actual imports. However, because "tileboard" remains defined at this stage only in the most general terms, see *infra* at 20-34, i.e., "tileboard" includes any product of a density greater than 0.8 g/cm^3 used on walls, ceilings, or other parts of buildings, and both parties agree to the facts at this level of generality, summary judgment on the basis of Witex's failure to meet its burden is premature at this time. The Court does note that once a definition is established, Witex will bear the burden of proof concerning the identity of its merchandise. For example, if it is established that "tileboard" must look like ceramic tile, and if Witex does not know which entries, if any, have this pattern, Witex will fail to meet its burden of proof.

⁶By using the term "use", the Court is not implying that this is the only, or principle, use of the panels. Rather, the Court is merely recognizing that both parties agree that the panels are used on floors.

⁷The Government asks the Court not to consider this issue because Witex did not specifically brief it in this case. Def.'s Reply at 12, Def.'s Resps. Ct.'s Questions Prior Oral Argument on the Parties' Cross-Mot. for Summ. J. at 9. As the Government maintains: "Taken

If the merchandise is properly classified in heading 4411, HTSUS, Witex claims that it should be classified under subheading 4411.19.30, HTSUS, which covers "[t]ileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of walls, ceilings or other parts of buildings." Pl.'s Mem. at 14-24, Pl.'s Resp. at 6-18, Pl.'s Reply at 1-13. Witex maintains that Customs unduly restricted the scope of subheading 4411.19.30, HTSUS, by requiring that the panels be used on walls. Pl.'s Mem. at 16, Pl.'s Resp. at 7, Pl.'s Reply at 2-3.

The Government argues that the merchandise is classifiable under heading 4411, HTSUS. The Government asserts that Witex relies on a commercial definition of fiberboard used in Europe to support its contention that fiberboard can only be unfinished. Def.'s Mem. at 25-26. That European commercial definition, the Government contends, is irrelevant to the classification of products under the HTSUS. *Id.* In defining "tileboard," the Government points to the legislative history of the "tileboard" provision which includes a letter from J.J. Barker Co. to the Trade Policy Staff Committee seeking a provision for its imports. Def.'s Mem. at 11-13, 18, 20, Def.'s Reply at 8. According to the Government, J.J. Barker Co. had been importing its "tileboard" product duty free under the Tariff Schedule of the United States ("TSUS"), but was facing a 6% *ad valorem* duty with the transition to the HTSUS. Def.'s Mem. at 11-13; *see also* subheading 4411.19.40, HTSUS. Therefore, in order to ensure that J.J. Barker's "tileboard" imports did not face an increase in duty, the "tileboard" provision was added. *Id.* As the Government argues, because Witex's merchandise is not similar to J.J. Barker's "tileboard," Witex's merchandise cannot be considered "tileboard" within the meaning of subheading 4411.19.30, HTSUS. *Id.* The Government further argues that based on a dictionary definition of "tileboard," Def.'s Mem. at 16, 18, evidence from industry practice, Def.'s Mem. 17, 22, Def.'s Reply at 8-9, and the Government's expert witness, Def.'s Mem. at 21, Witex's panels are not "tileboard" because "tileboard: (i) is not laminated, (ii) is usually embossed with a pattern, and (iii) is coated with an epoxy or other [liquid] finish to resemble ceramic tile," Def.'s Mem. at 20-21 (brackets around "liquid" in original), (iv) is water-resistant, Def.'s Mem. at 17, 19-20, and (v) is only used on walls, Def.'s Mem. at 21. Accordingly, the Govern-

literally, a mandate to 'find the correct result' would require a court to conduct its own analysis of imported merchandise and scour the tariff statute to ensure that all possible provisions have been considered. Indeed, this appears to be precisely what Witex is suggesting." Def.'s Reply at 12. Despite this, the Government also asks the Court to find that *Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262 (Fed. Cir. 2004) controls this case insofar as it concerns the potential classification of the merchandise under heading 4418, HTSUS. *See, e.g.*, Def.'s Mem. Supp. Cross-Motion Summ. J. ("Def.'s Mem.") at 29. However, *Boen Hardwood Flooring* did not decide this issue, and heading 4418, HTSUS, was never argued by the parties, at least at the trial court level. The Government cannot have it both ways.

ment claims that because Witex's merchandise is laminated, is not embossed, does not look like ceramic tile, Def.'s Mem. at 20, is not water-resistant, Def.'s Mem. at 19-20, and is used as flooring, not wallboard, Def.'s Mem. 14 n.14, 22, it cannot be "tileboard." Therefore, the Government argues, Witex's product is excluded from sub-heading 4411.19.30, HTSUS, rendering it classifiable under 4411.19.40, HTSUS, covering "[o]ther" forms of fiberboard with a density of greater than 0.8 g/cm³ which are surfaced coated by more than oil.

STANDARD OF REVIEW

"The proper scope and meaning of a tariff classification term is a question of law . . . while determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact." *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (citations omitted). A Customs' classification ruling is subject to *de novo* review⁸ as to the meaning of the tariff provision, pursuant to 28 U.S.C. § 2640, but may be accorded a "respect proportional to its 'power to persuade.'" *United States v. Mead*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Both parties have moved for summary judgment pursuant to USCIT Rule 56. Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue* as to *any material fact* and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c)(emphasis added). Material issues only arise concerning "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Consequently, in classification cases, genuine issues of material fact only arise when there is a dispute over the use, characteristics, or properties of the merchandise being classified, *Brother Int'l Corp. v. United States*, 26 CIT ___, ___, 248 F. Supp. 2d 1224, 1226 (2002), or where commercial meaning is in question. *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). For the reasons set forth below, summary judgment for either party at this point is not warranted.

⁸Witex occasionally appears to suggest that Customs Rulings are reviewed under an abuse of discretion standard. See, e.g., Pl.'s Resp. at 9-10, Pl.'s Reply at 4-5. In classification cases, Witex must show that its product is "tileboard" under some definition of "tileboard." Even if the Government's definition is wrong, that does not by itself make a product "tileboard," nor does it resolve the case, for then the Court must define the term "tileboard." See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

DISCUSSION

"The proper classification of merchandise entering the United States is directed by the General Rules of Interpretation ('GRIs') of the HTSUS and the Additional United States Rules of Interpretation." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The HTSUS is organized by headings setting forth general categories of merchandise; below each heading are listed subheadings (and then further subdivisions) that more specifically describe products within each heading. *Id.* According to the GRIs, a Court must choose the most appropriate heading, and then, "[o]nly after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." *Id.* at 1440 (citing GRI 1, 6, HTSUS). Once the Court chooses the proper heading, the Court is limited to choosing a subheading only from within the proper heading, i.e., the subheadings appearing under other headings become irrelevant for the classification of the merchandise at issue. *Id.*

Because there is a dispute as to the proper heading, the Court will first determine whether the flooring panels are properly classified under heading 4411, HTSUS. After finding that the merchandise is properly classifiable under heading 4411, HTSUS, the Court will construe subheading 4411.19.30, HTSUS, ultimately concluding that material issues remain to be resolved.

I. Choosing the Proper Heading

A. Meaning of Fiberboard

As required by GRI 1, HTSUS, "classification shall be determined according to the terms of the headings and any relative section or chapter notes. . . ." Heading 4411, HTSUS, covers "[f]iberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances." Both parties concede that the merchandise is made with a fiberboard core. Pl.'s Statement Undisputed Facts Supp. Pl.'s Mot. Summ. J. at para. 2, Def.'s Statement at para. 1. Fiberboard is defined as "[a] general term that refers to any of various panel products such as particleboard, hardboard, chipboard, or other type formed by bonding wood fibers by heat and pressure." *Terms of the Trade* 130 (4th ed. 2000); see also *Webster's II New Riverside University Dictionary* 474 (1988) ("[a] building material made of plant fibers, as wood, bonded together and compressed into rigid sheets."). These definitions do not define "fiberboard" by any element of its finish.

Witex contends that Customs wrongfully classified its merchandise under heading 4411, HTSUS, because fiberboard includes only unfinished merchandise whereas Witex's merchandise is finished. To support its contention, Witex introduces a letter from the European Producers of Laminate Flooring ("EPLF") stating that "[f]rom an in-

dustry perspective . . . [l]aminate panelling, which is widely used in the industry for both wall and floor applications, cannot be fibreboard because, by definition, fibreboard is a component of some types of laminate and, at most, can be considered unfinished laminate." Letter from Peter H. Meyer, Managing Director of the European Producers of Laminate Flooring, to Bruce Aitken, Esq., Ex. 12 to Pl.'s Mem. at 12 (Feb. 28, 2002) ("EPLF Letter").⁹ Witex also cites the Deposition of Paul Garetto, a National Import Specialist, as saying: "If you asked for fiberboard, if you go to a lumberyard, probably they would direct you to a 4 by 8 sheet of fiberboard, probably unfinished." Dep. Paul Garetto, Ex. 14 to Pl.'s Mem. at 118 (Jan. 15, 2004).¹⁰ According to Witex's logic, because "fiberboard" is by definition unfinished, and because Witex's product is finished, the merchandise cannot be "fiberboard." Pl.'s Mem. at 12-14. Essentially, what Witex's argument boils down to is that there is a commercial meaning of "fiberboard" which precludes the classification of its merchandise under heading 4411, HTSUS. Witex's argument is unpersuasive for two reasons: (1) Witex has failed to establish a commercial meaning for the proposition it seeks; and (2) even if Witex were correct as to the meaning of "fiberboard," Witex reads the word "fiberboard" out of context with the rest of the tariff provision.

First, Witex fails to establish a commercial meaning for its merchandise. Witex is correct in claiming that an established commercial meaning prevails over a common meaning unless contrary to Congressional intent. See *Maddock v. Magone*, 152 U.S. 368, 371 (1894) (citing *Cadwalader v. Zeh*, 151 U.S. 171, 176 (1893)). However, in order to establish a commercial meaning, the party invoking a commercial meaning has the burden of proving that a term has a commercial meaning that is "definite, uniform, and general throughout the trade," *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999), and that this "definite, uniform, and general meaning" is used in the United States' trade and commerce, *Two Hundred Chests of Tea v. Smith*, 22 U.S. (9 Wheat) 430, 438 (1824) ("Whether a particular article were designated by one name or another, in the country of its origin . . . was of no importance in the view of the legislature."), *Wing Coffee Co., Ltd. v. United States*, 53 Cust. Ct. 60, 63

⁹The Court does not know what is meant by "unfinished laminate," i.e., whether "unfinished laminate" means that fiberboard must undergo further operations to become a finished laminate flooring panel, or whether it means that the fiberboard has not been surface coated with a finish. However, this ambiguity is immaterial for the reasons set forth below.

¹⁰Witex suggests that Paul Garetto's testimony represents the "common meaning" of "fiberboard." Pl.'s Mem. at 13-14. Because the determination of common meaning is a question of law, *Schott Optical Glass, Inc. v. United States*, 67 C.C.P.A. 32, 34, 612 F.2d 1283, 1285 (1979), and the common meaning of a word should be readily obtainable to all persons who do not have specialized knowledge, testimony regarding a common meaning is considered only advisory. See *Toyota Motor Sales, U.S.A., Inc. v. United States*, 7 CIT 178, 183-84, 585 F. Supp. 649, 654 (1984).

(1964). Accordingly, "in considering the commercial designation of a tariff term, *only* commercial use of that term in the *United States* is relevant." *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1049 (Fed. Cir. 2001) (emphasis added).

The evidence proffered by Witex fails to meet the burden of proof for establishing a commercial meaning in this case. A letter from a single European trade association, that represents only producers of laminate flooring,¹¹ does not provide any evidence of a definite, general, and uniform meaning of a term as used in the United States. Nor is Witex's claim supported by the Deposition of Paul Garretto. The Deposition of Paul Garretto merely establishes that if a person asked for fiberboard at a lumberyard, they "probably" would be directed to unfinished fiberboard. This does not constitute evidence that if fiberboard is finished it is no longer fiberboard. Because Witex has failed to adduce any probative evidence for a "definite, uniform, and general" commercial meaning for "fiberboard," the Court is bound by the common meaning of fiberboard as that term appears in heading 4411, HTSUS.¹²

Secondly, Witex's reading of heading 4411, HTSUS, is belied by the language of the heading, chapter notes, and the Explanatory Notes. Heading 4411, HTSUS, is an *eo nomine* provision as it "describes a commodity by a specific name." *Am. Hardboard Ass'n v. United States*, 12 CIT 714, 715 (1988); see also *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000). Because *eo nomine* "provision[s] include[] all forms of the named article unless limited by [their] terms," *Am. Hardboard*, "[a]n improvement in merchandise provided for *eo nomine* does not remove it from classification under the *eo nomine* designation." *Arthur J. Humphreys, Inc. v. United States*, 973 F.2d 1554, 1556 (1992). Consequently, when an *eo nomine* provision is used as it is in heading 4411, HTSUS, the tariff term implicitly means fiberboard and products made from fiberboard.¹³ Therefore, even if a piece of fiberboard has been further worked be-

¹¹ Witex also cites the European Committee for Standardization's definition of fiberboard: "panel material with a nominal thickness of 1.5 mm or greater, manufactured from lignocellulosic fibers with application of heat and/or pressure." Pl.'s Mem. at 13. If this definition were relevant, it would still not support Witex's contention because it does not impose any requirement that fiberboard be "unfinished."

¹² Just because the Court rejects the notion that fiberboard has a commercial meaning in the manner suggested by Witex does not mean that other terms under heading 4411, HTSUS, do not have commercial meanings. See *infra* at 24-32.

¹³ Chapter Note 4 to Chapter 44, HTSUS, mandates that there is a point where the product has been sufficiently advanced such that it no longer falls within the *eo nomine* designation. However, the Court rejected in *Faus Group, Inc. v. United States*, slip op. 04-143 (CIT Nov. 15, 2004) the argument that surface covering and tongue-and-grooving fiberboard were sufficient to remove a product from heading 4411, HTSUS.

This reading is also consistent with the North American Laminate Flooring Association's definition of fiberboard which recognizes that "fiberboard" is a "core material." See North American Laminate Flooring Association, *Laminate Flooring*, Ex. 6 to Pl.'s Mem. at 2.

yond its raw form, it still remains classifiable under heading 4411, HTSUS.

The drafters of the HTSUS, and Congress, recognized that heading 4411, HTSUS, includes fiberboard products that have been further worked through the inclusion of Chapter Note 4 to Chapter 44 which provides that "[p]roducts of heading 4410, 4411, or 4412 may be worked to form the shapes provided for in respect of articles of heading 4409, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular or submitted to any other operation provided it does not give them the character of articles of other headings." Chapter Note 4 to Chapter 44, HTSUS.¹⁴ Chapter Note 4 admits that fiberboard products transformed beyond their raw character are nonetheless still classifiable under heading 4411, HTSUS, unless subjected to an operation, not among those enumerated, that gives the product the character of an article in another heading. The Explanatory Note to 44.11 further specifies that "[i]mpregnating or other agents may also be added during or after manufacture of the board to give an extra property, e.g., impermeability to water or resistance to rot, insect attack, fire or the spread of flame." *Harmonized Commodity Description and Coding System*, Explanatory Note 44.11 (2nd ed. 1996) at 680 ("Explanatory Notes" or "EN"); cf. Chapter 44, U.S. Note 1(c), HTSUS. Last, the subheadings under heading 4411, HTSUS, include products such as "tileboard," subheading 4411.19.30, HTSUS, and "[l]aminated boards bonded in whole or in part, or impregnated, with synthetic resins," subheading 4411.29.20, HTSUS. Witex's reading of heading 4411, HTSUS, to preclude classification of its laminated paneling therein, would render nugatory the above referenced provisions, in violation of the well-established rule of statutory construction that all parts of a statute should be given effect if possible. See *Weinberger v. Hyson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). Therefore, the text and Explanatory Notes demonstrate a clear Congressional intent not to use the restrictive definition of "fiberboard" advanced by Witex. Accordingly, even if Witex could prove its commercial meaning of "fiberboard," there is a clear indication that Congress did not intend Witex's claimed commercial meaning. See *Cadwalader v. Zeh*, 151 U.S. 171, 176 (1894) (the "commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention.").

B. Other possible headings

Alternatively, Witex asks the Court to choose another appropriate heading, referencing the dispute before the Court in *Faus Group, Inc. v. United States*, slip op. 04-143 (CIT Nov. 15, 2004), which

¹⁴For a thorough discussion of Note 4 to Chapter 44, see *Faus Group, Inc. v. United States*, slip op. 04-143 (CIT Nov. 15, 2004).

deals with heading 4418, HTSUS, covering "[b]uilders' joinery and carpentry of wood." Pl.'s Mem. at 25. In *Faus Group*, slip op. 04-143 (CIT Nov. 15, 2004), the Court found that nearly identical laminated flooring panels were properly classifiable under heading 4411, HTSUS, and not under heading 4418, HTSUS. Because Witex does not present any arguments or evidence that would distinguish its merchandise from the merchandise in *Faus Group*, the Court deems that Witex's flooring panels are likewise classifiable under heading 4411, HTSUS, for the reasons set forth in *Faus Group*.

C. Heading 4411, HTSUS, is the proper heading

Because Witex's merchandise is classifiable under heading 4411, HTSUS, and there are no other appropriate headings under which its merchandise would fall, heading 4411, HTSUS, is the proper heading for Witex's flooring panels.

II. Choosing the Proper Subheading

Finding that Witex's flooring panels are properly classified under heading 4411, HTSUS, the Court next addresses under which subheading the merchandise falls. Both parties agree that, if the merchandise falls under heading 4411, HTSUS, the merchandise either falls under subheading 4411.19.30, HTSUS, for "[t]ileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of walls, ceilings, or other parts of building," or subheading 4411.19.40, covering all "other" fiberboard products with densities greater than 0.8 g/cm³ which are surface covered by more than an oil treatment.¹⁵ Because subheading 4411.19.40, HTSUS, is a basket provision, i.e., covering all products not classifiable elsewhere,¹⁶ the flooring panels are only classifiable in subheading 4411.19.40, HTSUS, if they are not classifiable under sub-

¹⁵ There are three categories of subheadings under heading 4411, HTSUS, differentiating products on the basis of the density of the fiberboard product: (1) subheadings 4411.11-4411.19, HTSUS, covering fiberboard products with densities of greater than 0.8 g/cm³; (2) subheadings 4411.21 - 4411.29, HTSUS, covering fiberboard products with densities exceeding 0.5 g/cm³ but not exceeding 0.8 g/cm³ and; (3) subheadings 4411.31 - 4411.99, HTSUS, covering fiberboard with density of less than 0.5 g/cm³. Because Witex's flooring panels have a density of greater than 0.8 g/cm³, they fall within the first category of goods. This category is further divided as to whether the merchandise has been "mechanically worked or surface covered" where surface covered "means that one or more exterior surfaces of a product have been . . . overlaid with paper . . ." Chapter 44, U.S. Note 1(c), HTSUS. Witex's flooring panels are overlaid with a color photograph of wood and are therefore "surface covered." This subdivision is further subdivided for products that have not been "surface covered (except for oil treatment)" which does not include Witex's merchandise because of the paper overlay.

¹⁶ Witex appears confused by what is meant by a "basket provision." See Pl.'s Mem. at 11. Classifying a product in a "basket provision" does not mean that a product is "unfinished." A "basket provision" is simply used to classify products not classifiable elsewhere. In fact, to be classified under subheading 4411.19.40, HTSUS, a product must be mechanically worked

heading 4411.19.30, HTSUS. See *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (citing *EM Indus., Inc. v. United States*, 22 CIT 156, 165, 999 F. Supp. 1473, 1480 (1998)). Consequently, this case hinges on the meaning of subheading 4411.19.30, HTSUS.

Subheading 4411.19.30, HTSUS, covers "[t]ileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of walls, ceilings, or other parts of buildings." Subheading 4411.19.30, HTSUS. The language of the subheading requires a product to exhibit three features: (1) it must be "tileboard"; (2) which has been continuously worked along any of its edges; and (3) is dedicated for use in the construction of walls, ceilings or other parts of buildings. Both parties essentially agree that Witex's flooring panels satisfy the last two prongs of the test: the panels are tongue-and-grooved along their edges, satisfying the second prong; moreover, the panels are used on "floors" which may be included within the meaning of "other parts of buildings."¹⁷ However, the parties do not agree on the meaning of the word "tileboard." Consequently, the Court must define "tileboard" to determine whether the flooring panels can be classified under subheading 4411.19.30, HTSUS.

A. The Legislative History

"The first step in properly construing a tariff classification term is to determine whether Congress *clearly defined* that term in either the HTSUS or its legislative history." *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001) (emphasis added). "Tileboard" is not defined in the HTSUS; however, both the Customs' Ruling, Headquarters Ruling ("HQ") 960084 ((December 10, 1997), and the Government in this case have suggested that "tileboard" is defined by the legislative history of subheading 4411.19.30, HTSUS.

and surface coated by more than just oil which makes products classifiable there far from "unfinished."

¹⁷The Court agrees that "other parts of buildings" may include floors. However, because "other parts of buildings" may include floors, it does not necessarily follow that "other parts of buildings" must include floors. Rather, the "other parts of buildings" modifies "tileboard." In other words, this language means "other parts of buildings" where "tileboard" is used — if "tileboard" is not used on floors, then floors are not another part of a building where "tileboard" is used. Because *eiusdem generis* is only applicable where legislative intent is unclear, see 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.18 at 287–88 (6th ed. 2000), if the Government can establish that the clear meaning of "tileboard" requires principle use on walls, then "other parts of buildings" cannot be read to enlarge the definition of "tileboard." As a brief aside, the phrase "wall, ceilings and other parts of buildings" was employed by the TSUS in defining "building boards." See Headnote 1(e) of Part 3 of Schedule 2 TSUS (1987). Neither of the two cases evaluating this term, *Am. Hardboard Ass'n v. United States*, 12 CIT 714 (1988), *F.W. Myers & Co., Inc. v. United States*, 59 Cust. Ct. 427, 275 F. Supp. 811 (1967), appear to lend assistance to the inquiry here.



In 1989, as part of an international effort to adopt a common nomenclature across nations, see *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed. Cir. 1999), the United States agreed to adopt the headings and subheadings (up to the six digit level) established under the international Harmonized Schedule, but reserved the right to create further subdivisions beyond the six digit level, see International Convention on the Harmonized Commodity Description and Coding System Article 3(3) found at <http://www.wcoomd.org/ie/En/Conventions/conventions.html>.¹⁸ Before the transition to the HTSUS became fully effective, J.J. Barker, Co. ("J.J. Barker"), an importer of "tileboard," alerted the Trade Policy Staff Committee ("TPSC")¹⁹ that although its imports of paneling were duty free under the TSUS, under the proposed HTSUS J.J. Barker's product would face a 6% *ad valorem* duty rate. See Letter from S.C. Gauthier to Christopher P. Marcich, Director of Tariff Affairs, Ex. D to Def.'s Mem. (Jan. 8, 1988) ("Barker Letter"). According to the Government, the TPSC responded by adding subheading 4411.19.30, HTSUS, in order to maintain duty free treatment for J.J. Barker's imports. Def.'s Mem. at 11-14. According to the Government, because J.J. Barker's product was referred to as "tileboard," the Court should look to that product as a model for what constitutes "tileboard" within the meaning of subheading 4411.19.30, HTSUS. See Def.'s Mem. at 12-13. The Government, gleaned its information from a product brochure, *Easy Living — With Barker*, Ex. E to Def.'s Mem., describes "tileboard" as "completely water resistant decorative wall panels made of non-laminated hardboard with a density of 1.15 g/cm³ with their surface painted, coated and grooved to imitate individual ceramic tiles." Def.'s Mem. at 12.

The letter from J.J. Barker cited by the Government, however, is of dubious probative value and does not provide a definite or express definition of "tileboard." As the Supreme Court has noted:

Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. We ought

¹⁸ The "tileboard" classification is beyond the six-digit level, and each nation is allowed to create its own subdivisions beyond the six-digit level. How Europe classifies these goods is therefore irrelevant when considering how the United States should classify goods at this level unless a party can show that the creation of the U.S. provision was influenced by the European nomenclature.

¹⁹ The TPSC was responsible for converting the TSUS to the HTSUS. The TPSC solicited public comment for the express purpose of "[a]void[ing], to the extent practicable and consonant with sound nomenclature principles, changes in rates of duty on individual products." *Public Hearings on the Harmonized Commodity Description and Coding System*, 48 Fed. Reg. 34,822, 34,823 (USTR Aug. 1, 1982).

not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal — even assuming the precise intent of the group can be determined. . . .

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120 (2001) (citations omitted). Similarly, the court in *United States v. Paramount Publix Corp.*, 22 C.C.P.A. 452, 460 (1934) found that committee testimony of interested parties was not “controlling since the enactment of the provision in the language before us might have been with an intent wholly different from that indicated by the witnesses.” This problem is particularly acute here where there is no indication of how the TPSC, or Congress, defined “tileboard” in relation to J.J. Barker’s product.²⁰ Therefore, this history does not provide the Court with a definite or express definition of “tileboard.”²¹

Consequently, because the legislative history is of a non-dispositive nature, this case cannot be resolved by looking first to the legislative history for a definition. This does not mean that the Court deems the legislative history irrelevant for future use to bolster a definition; it simply means that at this juncture, the instant case cannot be resolved by recourse to the legislative history.

²⁰In its letter to the TPSC, J.J. Barker only described its product as “finished hardboard” of “high quality, high priced ‘tileboard’ bath and kitchen panels.” Barker Letter, Ex. D to Def.’s Mem. at 1. (Note that: (a) the letter describes the merchandise not just as “tileboard,” but a certain type of “tileboard” — i.e., “high quality, high priced ‘tileboard’ ” and (b) J.J. Barker also felt it was necessary to mention that its product was used in the bath and kitchen, an unnecessary defining feature if the only use of “tileboard” was in the bath and kitchen.) J.J. Barker appended a classification ruling from 1971 that described the product as “hardboard wall panels which are coated with melamine” which were bull-nosed, or rounded, along their vertical edges. *Id.* at 4; cf. with the Government’s description, Def.’s Mem. at 12 (J.J. Barker’s product was “completely water resistant decorative wall panels made of non-laminated hardboard with a density of 1.15 g/cm³ with their surface painted, coated and grooved to imitate individual ceramic tiles.”). It is not clear upon which, if any, of these descriptions, the TPSC based its definition of “tileboard.” Moreover, even if the Court were to adopt any of these descriptions, it would be impossible to determine what are the essential characteristics of “tileboard” on the basis of one product. For example, if a product matched the Government’s proffered description, but it was only 1.1 g/cm³ in density, or if the product imitated marble rather than ceramic tiles, would it still be “tileboard”? Nonetheless, this evidence is not completely valueless. For instance, if Customs sought to classify products in a way that would exclude J.J. Barker’s product from subheading 4411.19.30, HTSUS, this evidence may be probative.

²¹When the legislative history provides a clear or express definition of a tariff term, the Court will rely on that definition. For example, courts have used definitions in reports prepared in conjunction with the drafting of the tariff provision, see e.g., *Arthur J. Humphreys, Inc. v. United States*, 973 F.2d 1554, 1557 (Fed. Cir. 1992), or judicially established definitions of the same term used in an earlier version of the tariff schedule, see e.g., *Intercontinental Marble Corp. v. United States*, 381 F.3d 1169, 1175–76 (Fed. Cir. 2004) (using the commercial definition of marble as established under the TSUS when interpreting that term in the HTSUS). However, absent a clear or express definition provided by the legislative history, definitions gleaned from the legislative history are merely probative and are used to bolster or support a definition derived from dictionaries, lexicons, scientific authorities, and other such reliable sources. Cf., *Anhydrides & Chems., Inc. v. United States*, 130 F.3d 1481 (Fed. Cir. 1997).

B. Commercial Meaning

When the HTSUS or legislative history do not define a term, the Court looks to the term's common or commercial meaning. Both parties have suggested that there is a commercial meaning for the term "tileboard."²² Because a commercial designation, once proven, takes precedence over a common meaning, see *Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262, 1265 (Fed. Cir. 2004), it is appropriate to determine if either party has established, or can establish, a commercial meaning. Cf. *Cadwalader v. Zeh*, 151 U.S. 171, 176 (1893) ("it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted"). Proof of a commercial meaning is a matter of fact, not law. *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001); but cf. *Boen*, 357 F.3d at 1265.

As this Court has long maintained, the rule of commercial designation is "intended to apply to cases where the trade designation is so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted." *Jas. Akeroyd & Co. v. United States*, 15 Ct. Cust. App. 440, 443 (1928). Accordingly, to establish a commercial meaning, a party must prove that "tileboard" has a commercial meaning in the trade "which is general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country)." *Rohm & Haas Co. v. United States*, 5 CIT 218, 226, 568 F. Supp. 751, 757 (1983) (citations omitted). "The commercial meaning of tariff terms must be proved by persons engaged in buying and selling the merchandise at wholesale in the United States, or by persons who know, by their own experience or of their own knowledge, the meaning of the designation applied to the merchandise by those who buy and sell it at whole-

²²The Court has been able to locate certain dictionary definitions of "tileboard." See *Webster's Third New International Dictionary* 2393 (1986) ("1: a board used in interior finishing and made from a large sheet of any of various materials having a decorative coating simulating a tiled surface. 2: a thin large square piece (as of wood) often with beveled edges that is fitted together with other like pieces to cover ceilings or walls."); *McGraw-Hill Dictionary of Scientific and Technical Terms* 2151 (6th ed. 2003) ("[a] type of wallboard used for interior finishing in which the outer surface is a layer of hard glossy material, usually simulating tile."); *Terms of the Trade* 342 (4th ed. 2000) ("[a] hardboard panel that has been embossed with a pattern and then coated with epoxy. The resulting product is designed to look like ceramic tile, for use in kitchens, bathrooms, etc."); *Dictionary of Architecture and Construction* 939 (3rd ed. 2000) ("1. A wallboard used for interior finishing; usually a base sheet material overlaid with a hard, glossy decorative facing to simulate tile. 2. Square or rectangular boards, usually made of compressed wood or vegetable fibers, often with beveled interlocking edges, used for ceiling or wall covering."); *Reed Construction Data* at <http://www.rsmeans.com/dictionary/index.asp?s=tileboard> ("(1) A wallboard with a factory-applied facing which is hard, glossy, and decorated to simulate tile. (2) A square or rectangular board of compressed wood or vegetable fibers, used for ceiling or wall facings.") (access is free upon registration, which is also free).

sale."²³ *Rice Millers' Ass'n, Am. Mfrs. v. United States*, 15 Ct. Cust. App. 355, 360 (1928). Moreover, mere negative inference that a product is excluded from a commercial designation is insufficient; rather, a party must offer positive evidence of the actual meaning of the commercial designation. *United States v. Fung Chong Co.*, 34 C.C.P.A. 40, 44 (1946); *Carl-Zeiss, Inc. v. United States*, 22 CIT 606, 610-11, 16 F. Supp. 2d 1097, 1101 (1999). Last, minus a clear statement of commercial practice, *Boen*, 357 F.3d at 1265, testimony by witnesses is an indispensable tool in establishing a commercial meaning. See, e.g., *Passaic Worsted Co. v. United States*, 17 C.C.P.A. 459, 461-62 (1930); *Rice Millers'*, 15 Ct. Cust. App. at 360. Both parties' evidence fails to meet these standards.²⁴

²³No evidence has been submitted of this nature. Testimony by persons who buy at wholesale, such as buyers for large home improvement stores, would likely produce greatly illuminating evidence of commercial meaning.

²⁴Witex submits a letter from C. Curtis Peterson ("Peterson"), the Executive Vice President of the American Hardboard Association ("AHA"), defining "tileboard" in such a way as to embrace Witex's product. Letter from C. Curtis Peterson to Witex USA, Inc. Ex. 10 to Pl.'s Mem. at 4-5 (Sept. 3 1997) ("Peterson Letter"). However, the Government has argued that this letter is susceptible to two meanings, see Def.'s Mem. at 16, and it appears that Witex never sent a sample of its merchandise for evaluation in garnering this opinion. Witex also cites a letter from the EPLF. See, e.g., Pl.'s Mem. at 5. First, for the reasons stated above, the EPLF does not represent United States commercial practice. See *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1049 (Fed. Cir. 2002). Second, the EPLF's letter works against Witex rather than for it. The letter states: "Tileboard" is considered in the industry to be backing for ceramic tiles." EPLF Letter, Ex. 12 to Pl.'s Mem. Note, the letter does not say "the simulation of ceramic tiles", rather it says "backing" for ceramic tiles. There is no indication from either party that Witex's merchandise is used in conjunction with ceramic tiles; even if simulating ceramic tiles were sufficient, "tileboard" would most likely not cover the simulation of wood.

The Government's evidence fails no better. The Court notes the most relevant of the Government's submissions. (1) The Government alleges that "the Lowes Home Improvement Center in Brooklyn, New York, displays products labeled as 'tileboard,' such as [a physical sample the Government provided the Court], in its 'decorative wall paneling' section while laminated flooring is located in the 'flooring' section." Def.'s Mem. at 22; Def.'s Reply at 9 n.23. This is not corroborated by affidavit, deposition or other evidentiary material. See USCIT R. 56(e). (2) The Government submits pictures of Louisiana Pacific Graystone Tileboard, i.e., *Louisiana Pacific Graystone Tileboard*, Ex. B. to Def.'s Mem., without reference to who took them or where the pictures are from, e.g., a webpage URL or product brochure; these pictures cannot be considered as evidence. (3) The Government cites the *Study Concerning the Tariff Classification of Imported Laminate Flooring Panels*, a report prepared by F. Holbrook Platts ("Platts") of Platts Laminate Technologies which should have been appended to that brief. Def.'s Mem. at 21. However, the Government has not provided the Court with a copy of that report, the credentials of Platts, or indicated upon what Platts bases his conclusion. (4) Of, and to the extent, the Government is attempting to incorporate Voluntary Product Standard 59-73 on "Prefinished Hardboard Paneling," see Def.'s Mem. at 16-17, the Court notes that this Product Standard was withdrawn in 1980. See *Status Report on Withdrawal of Voluntary Product Standards*, 45 Fed. Reg. 55,250, 55,250-51 (Nat'l Bureau of Standards Aug. 19, 1980), American National Standards Institute, *Prefinished Hardboard Paneling* (1973) (with the word "withdrawn" stamped on its cover) (on file with the Court). Moreover, the product standard merely defines products by their finish thereby supporting the Peterson letter (not, necessarily, the Government's position). See American National Standards Institute, *Prefinished Hardboard Paneling* (1973). (5) The Government's citations to tileboard manufacturers' web sites are not evidence of testimony by

Ordinarily, upon the failure of a party, or parties, to establish a commercial designation, the Court will find that there is no commercial meaning and turn to the common meaning of the tariff term. However, it appears premature to entirely reject the possibility that "tileboard" does have a commercial meaning in this case. Rather, what "evidence" has been offered as to commercial meaning has not been sufficiently developed to determine if there is a commercial meaning, and if there is, what exactly that commercial meaning is.

First, both parties agree that the American Hardboard Association ("AHA") does have a commercial designation for "tileboard." In fact, at least two Customs Rulings have relied, at least in part, on the AHA's commercial definition(s) of "tileboard." HQ 960084 at 4; HQ 085913 at 2 (January 8, 1990). However, neither party has offered testimonial evidence to this effect, and what evidence they have produced is confusing.²⁵ Because the sources cited by the parties do suggest that the AHA does have a commercial designation, testimony is

wholesalers. See e.g., Def.'s Mem. at 17-18, 22. (6) The Government refers to the National Emissions Standards for Hazardous Air Pollutants for the Surface Coating Operations of Wood Building Products prepared by the Environmental Protection Agency ("EPA"). Def.'s Mem. at 22. If the Government submitted evidence that these regulations were promulgated on the basis of industry standards this evidence might be probative; however, the Government has failed to do so, rendering this evidence of low probative value. Cf. *RSMC Inc. v. United States*, 84 Cust. Ct. 96, 100 (1980). Moreover, without more information, the Court cannot ascertain whether the surface coating criteria used by the EPA is supportive of, or contradictory to, the American Hardboard Association's definition of surface coating discussed *infra* at notes 25 and 26. (7) The Government notes that Witex has never marketed its product as "tileboard." See, e.g., Def.'s Resp. Ct.'s Questions Prior Oral Arguments Parties' Cross-Motions Summ. J. at 5. Although evidence of marketing practice may be suggestive, it is not dispositive. See *Rainin Instrument Co. v. United States*, 27 CIT _____, 288 F. Supp. 2d 1360, 1366 (2003); cf. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1380 (Fed. Cir. 1999). Moreover, this does not provide the reason for exclusion, i.e., to which part of the Government's proposed five prong test this evidence lends credence.

²⁵Custom's initial Headquarters Ruling interpreting subheading 4411.19.30, HTSUS, relied on a commercial designation provided by the AHA. HQ 085913 at 2 (January 8, 1990) (citing the AHA's definition of "tileboard" as: a "hard, durable, and water-resistant coating or finishing applied to fiberboard to give it a ceramic-like or marble-like look."). Likewise, the Ruling in this case supported its conclusion by relying on the opinion of the AHA, albeit with a different definition. HQ 960084 at 4 (noting that tileboard and flooring are separate products). As noted above, Witex has submitted a letter from C. Curtis Peterson ("Peterson"), the Executive Vice President of the AHA, which offers yet another definition of "tileboard." Peterson Letter, Ex. 10 to Pl.'s Mem. at 4 ("Tileboard is a melamine coated high density fiberboard panel product" and "[t]he defining characteristic of tileboard paneling is its 'finish' which Peterson defines by reference to the American National Standard (ANSI/AHA A135.5-1995) for Class I Finishes.). Fourth, the Government references the AHA Publication entitled "Tileboard Wall Paneling" that "explains that tileboard paneling is suitable for installation in any room in the home including kitchen and laundry, and that it has a hard durable surface that is highly resistant to stains and moisture when properly installed and maintained." Def.'s Mem. at 16-17. The Government did not cite an exhibit number, but the Court found what appears to have been that to which the Government is referring as an Exhibit to the Amicus' Brief. See Ex. A to Brief of Amicus Curiae Congoleum Corp. in Supp. of Pl.'s Motion for Summ. J. ("Brief of the Amicus"). Testimony by a representative of the AHA would help the Court determine if these definitions can be reconciled.

required to determine to which, if any, of these definitions the AHA subscribes.²⁶

Second, evidence from industry practice, suggests that the industry may define "tileboard" differently from common sources. For example, the *Terms of the Trade* specifies that "tileboard" is "[a] hardboard panel that has been embossed with a pattern and then coated with epoxy. The resulting product is designed to look like ceramic tile, for use in kitchens, bathrooms, etc." Def.'s Mem. at 16 (citing *Terms of the Trade* 280 (3rd ed. 1993)).²⁷ Using this definition, the Government deduces that "tileboard" must have an appearance of ceramic tile. Def.'s Mem. at 20–21. However, the Government also cites literature from ABT Co., the manufacturer of AquaTile® Embossed Tileboard, claiming that ABT Co.'s Tileboard has "the look of fine tile and marble." Def.'s Mem. at 17. Moreover, in HQ 085913, discussing Plywood Panels Inc.'s "tileboard," Customs refers to a definition of "tileboard" provided by the AHA as requiring "tileboard" to have a ceramic tile or marble appearance. HQ 085913 at 1 (January 8, 1990).²⁸ Plywood Panels Inc.'s "tileboard" likewise has a "ceramic or marble" appearance. *Id.*, Def.'s Mem. at 13 n.13. Depending

²⁶Both the Government, and Customs' Ruling, reference the AHA Publication entitled "Tileboard Wall Paneling" for the proposition that: "tileboard paneling is suitable for installation in any room in the home including kitchen and laundry, and that it has a hard durable surface that is highly resistant to stains and moisture when properly installed and maintained." Def.'s Mem. at 16–17; see also HQ 960084. This publication does include language to this effect, but also notes that "[h]ardboard tileboard paneling is covered by U.S. Department of Commerce Voluntary Product Standard PS 59, 'Prefinished Hardboard Paneling,' (ANSI A 135.5–1973) Class 1 Finish," American Hardboard Association, *Tileboard Wall Paneling*, Ex. A to Amicus' Brief at 4, which Witex's product may satisfy, see Aff. of Danny Thomas, Ex. 10 to Pl.'s Mem. at 3 (asserting that Witex meets the ANSI A 135.5–1995 Standard). The meaning of this passage is far from unequivocal. If a product meets the ANSI A135.5–1973 finish specifications (which is presumably an earlier version of the ANSI A 135.5–1995 specifications cited by Witex), does this make the tileboard suitable for application in bathrooms and kitchens, or are these independent requirements? The Government's argument is a little difficult to understand because on the one hand the AHA requires that "tileboard" pass the ANSI A135.5–1973 Standard, which may include a test for humidity resistance, cf. Peterson Letter, Ex. 10 to Pl.'s Mem. at 4 (citing the ANSI A 135.5–1995 Standard which includes a test for "humidity resistance"), while on the other hand, the Government also alleges that tileboard must have greater properties for water resistance than those required by ANSI A 135.5–1973. This problem is made especially difficult because: (a) the Government uses multiple means of referring to water resistance such as "highly resistant to stains and moisture," Def.'s Mem. at 16, or "complete resistance to moisture," *id.* at 19; (b) frequently discusses water-resistance in terms of where a product is used, e.g., in bathrooms, Def.'s Mem. at 20; and (c) has nowhere defined the required level of water resistance necessary for a product to be considered "tileboard."

²⁷Note that this definition does not require products to be used on walls, and does not necessarily require the product to be water-resistant and to be non-laminated.

²⁸Evidence of this definition has not been submitted to the Court. However, the Court may take judicial notice of the logic and reasoning of Customs Rulings, cf. *United States v. Mead*, 533 U.S. 218, 235 (2001), especially when the Court is looking to displace a commercial meaning used by Customs with a different common meaning. The Court also notes that, as addressed in Note 25, this definition is only one variant of the possible AHA definitions, and is the only one that requires a particular appearance. Therefore, when giving the Gov-

on how one defines "designed to look like ceramic tile," ABT Co.'s and Plywood Panels Inc.'s products would not be "tileboard" because of their marble appearance. In other words, products the Government uses as evidence of "tileboard" would in fact not be "tileboard." Although the evidence from manufacturers is of questionable probative value, when joined with the purported AHA definition, this evidence leads the Court to believe that there may be a commercial definition of "tileboard" that deviates from the common meaning.

Because the parties have not adequately supported their proffered commercial definitions of "tileboard" despite the fact that a commercial designation seems probable, it is impossible for the Court to exclude the possibility of a commercial designation and arrive at the proper construction of subheading 4411.19.30, HTSUS.²⁹ However, because of the Court's duty to determine the correct meaning of tariff terms, see *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984), Congress vested the Court of International Trade with broad discretionary powers necessary to resolve cases like this. See 28 U.S.C. § 2643. Specifically, 28 U.S.C. § 2643 (b) provides that:

If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or *adjudicative procedures* as the court considers necessary to enable it to reach the correct decision.

28 U.S.C. § 2643 (emphasis added). In addition, USCIT Rule 56(d) authorizes the Court, in this situation, to "direct[] such further proceedings in the action as are just." Therefore, in accordance with its duty to determine the correct meaning of "tileboard," the Court finds that summary judgment is not appropriate at this time and orders the parties to prepare an order governing preparation for trial.

CONCLUSION

Because the Court finds the record insufficient to establish a commercial designation for the term "tileboard," or exclude the possibil-

ernment the benefit of the doubt that appearance matters, there is some tension between the commercial and common meaning.

²⁹ *Witex* is joined by a companion case, *Faus Group*, slip op. 04-143 (CIT Nov. 15, 2004). The counsel in that case has rested its resolution on the disposition of this case. Furthermore, these proceedings are joined by Amicus Congoleum Corporation who has secured an order from the Court suspending its case on the Court's Reserve Calendar pending resolution of this case. Therefore, the interest in developing a cogent and correct theory of subheading 4411.19.30, HTSUS, to apply to future cases (which is not a mere possibility) is strong. Given that once a commercial or common meaning is established, that meaning remains controlling, see e.g., *Intercontinental Marble Corp. v. United States*, 381 F.3d 1169, 1176 (Fed. Cir. 2004), it is important that the Court not rush to define "tileboard" with less than complete information as to its meaning.

ity thereof, the cross motions for summary judgment are denied. The parties shall jointly prepare an order governing preparation for trial and submit it to the Court by December 15, 2004.

Slip Op 04-145

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

ELKEM METALS COMPANY and GLOBE METALLURGICAL INC., Plaintiffs, v. UNITED STATES, Defendant, and RIMA INDUSTRIAL S/A, Defendant-Intervenor.

Court No. 02-00232

[Commerce's *Remand Redetermination* is remanded.]

November 16, 2004

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Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Reginald T. Blades, Jr.*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel: *Barbara J. Tsai*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Greenberg Traurig, LLP (Philippe M. Bruno and Rosa S. Jeong) for Rima Industrial S/A, defendant-intervenor.

OPINION

I. Standard of Review

The Court will uphold the United States Department of Commerce's ("Commerce") redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

II. Background

Commerce issued its final results of the antidumping duty administrative review on silicon metal from Brazil on February 12, 2002. See *Final Results of Antidumping Duty Administrative Review of Silicon Metal From Brazil* ("Final Results"), 67 Fed. Reg. 6,488 (Feb. 12, 2002). Elkem Metals Company and Globe Metallurgical Inc. (collectively, "Plaintiffs") filed a complaint on April 15, 2002, challenging Commerce's *Final Results*. See Compl. On October 24, 2002, Plaintiffs filed a motion for judgment upon the agency record and requested that the Court remand the *Final Results* to Commerce with instructions to include in its constructed value ("CV") calculation the value added tax ("VAT"), which was paid by Rima Industrial S/A ("Rima") upon certain production inputs.¹ See Pls.' Br. Supp. Mot. J. Upon Agency R. at 11. Commerce subsequently made a motion to dismiss for lack of jurisdiction as moot because Commerce's test calculation did not change the final dumping margin. See Def.'s Reply Pls.' Opp'n Def.'s Mot. Dismiss Lack Juris. Moot at 9. On February 14, 2003, Rima moved to strike from the Court record portions of Plaintiffs' opposition to Commerce's motion to dismiss. See Def.-Intervenor's Mot. Strike R. Portions Pls.' Opp'n Def.'s Mot. Dismiss. The Court denied Rima's motion and ordered Rima and Commerce to respond to Plaintiffs' motion. See *Elkem Metals Co. v. United States*, 27 CIT ___, 297 F. Supp. 2d 1347 (2003).

On January 29, 2004, Commerce filed a motion for voluntary remand for it to include the VAT Rima incurred upon inputs used for silicon metal production in its calculation of CV. See Def.'s Mot. Remand. Rima consented to the remand but noted that the calculation of CV also requires an accounting of the VAT credits included in Rima's costs thereby ensuring that double counting does not occur. See Def.-Intervenor Rima Resp. Def.'s Mot. Remand at 2-3. On February 25, 2004, the Court remanded this matter to Commerce. On June 8, 2004, Commerce submitted its *Final Results of Redetermination Pursuant to Court Remand* ("Remand Redetermination"). On July 22, 2004, Plaintiffs filed comments with the Court regarding the *Remand Redetermination* and Commerce subsequently submitted its response to Plaintiffs' comments on September 16, 2004. Rima filed its response to Plaintiffs' comments on September 17, 2004. An oral argument was held before this Court on November 12, 2004.

¹Two types of VAT are at issue in this proceeding, *imposto sobre a circulacao de mercadorias e servicos* and *imposto sobre produtos industrializados*, which are imposed by the Brazilian government on purchases of certain goods and services. See Def.-Intervenor Rima Resp. Pls.' Comments Commerce Final Remand Results ("Rima's Resp.") at 3.

III. Commerce Improperly Excluded the VAT Rima Paid on Inputs in its Calculation of CV

A. Contention of the Parties

1. Plaintiffs' Contentions

Plaintiffs contend that 19 U.S.C. § 1677b(e) (2000) and case law require Commerce to include the VAT Rima paid on inputs in calculating CV. See Pls.' Comments Commerce Final Remand Results ("Plaintiffs' Comments") at 6-9. Plaintiffs argue that Commerce improperly excluded the VAT Rima paid on inputs. See *id.* Commerce's decision was based on a recent clarification made in the *Final Results of Antidumping Duty Administrative Review of Silicomanganese From Brazil* ("Final Results of Silicomanganese"), 69 Fed. Reg. 13,813 (Mar. 24, 2004).² See *id.* at 6. Plaintiffs contend that Commerce's rationale for excluding the VAT from Rima's CV calculation "is no different than its rationale for excluding the VAT in its original determination in this case." *Id.* at 7-8. Furthermore, Plaintiffs assert that Commerce "cited no record evidence to support its finding that Rima fully recovered the VAT it paid on inputs during the [period of review] and no such evidence exists." *Id.* at 7.

Plaintiffs argue that Commerce's interpretation is contrary to the plain language of the statute and to what the Court of Appeal for the Federal Circuit ("CAFC") actually decided. See *id.* at 9. The plain language of the statute allows for the exclusion of taxes paid on inputs from CV only when the VAT is remitted or refunded upon exportation. See *id.* at 9 (emphasis omitted). Plaintiffs note that the CAFC held that "unless [VAT] are remitted or refunded 'upon exportation' they are properly included in the constructed value of the exported merchandise." *Id.* (quoting *Camargo*, 200 F.3d at 774. The record indicates that the VAT paid by Rima on inputs was not remitted or refunded upon exportation. See *id.* Accordingly, Plaintiffs argue that based on the plain language of the statute and the CAFC case law the VAT incurred by Rima on inputs must be included in CV.

²Commerce interpreted *Aimcor v. United States*, 141 F.3d 1098 (Fed. Cir. 1998), and *Camargo Correa Metais, S.A. v. United States*, 200 F.3d 771, 774 (Fed. Cir. 1999) as "not dictat[ing] that VAT must always be included in CV unless the tax is remitted or refunded upon exportation." See Plaintiffs' Comments at 6-9 (quoting *Final Results of Silicomanganese*, 69 Fed. Reg. at 13,813). In *Final Results of Silicomanganese*, 69 Fed. Reg. at 13,813, Commerce determined that when the VAT paid is recovered by the producer during the period of review, the VAT is not incurred and does not constitute a material cost for the purposes of calculating CV. See Plaintiffs' Comments at 6. Moreover, Commerce found that 19 U.S.C. § 1677b(e) does not prohibit the exclusion of VAT from CV if those taxes are recovered after the exportation of the subject merchandise. See *id.* at 7 (citing *Final Results of Silicomanganese*, 69 Fed. Reg. at 13,813).

2. Commerce's Contentions

Commerce responds that the language of 19 U.S.C. § 1677b(e) requires that "internal taxes remitted or refunded upon exportation of the associated merchandise are to be disregarded in the calculation of constructed value." Def.'s Resp. Pls.' Comments Upon Commerce's Final Remand Determination ("Commerce's Resp.") at 4. Commerce asserts that the statute "provides no direction specifically for the treatment of internal taxes that are not remitted or refunded upon exportation of the associated merchandise." *Id.* Consequently, Commerce may recognize "that the Brazilian tax system provides mechanisms for the recovery of taxes paid, and Commerce may account for that recovery to determine the correct value of taxes actually incurred for inclusion in calculating constructed value." *Id.* Commerce argues that including the full amount of VAT Rima paid on inputs purchased would not accurately represent the cost of those materials if Rima recovered some or all of the VAT paid. *See id.* Based on this determination, Commerce's calculation of CV excluded the VAT paid by Rima.

Commerce further asserts that Plaintiffs' reliance upon the holdings of the CAFC, in *Aimcor*, 141 F.3d 1098 and *Camargo*, 200 F.3d 771, are misplaced. *See* Commerce's Resp. at 5. Commerce notes that the CAFC "found that the Brazilian VAT at issue was not remitted or refunded upon exportation of the associated merchandise and, therefore, was not required to be excluded from CV." *Id.* Commerce maintains that it may acknowledge that VAT paid on inputs may be recovered prior to exportation. *See id.* Commerce notes that the CAFC stated that "allowing a respondent to demonstrate that taxes paid upon inputs had been recovered 'does not foreclose a future interpretation of the statute that requires taxes to be remitted or refunded upon exportation to be excluded from the cost of materials.'" *Id.* at 6 (quoting *Aimcor*, 141 F.3d at 1109, n.19). Commerce argues that *Camargo*, 200 F.3d at 771, "stands for only the proposition that because the Brazilian VAT system does not remit or refund taxes upon exportation of the associated merchandise, the VAT paid cannot automatically, as a matter of law, be excluded from CV." Commerce's Resp. at 8.

Commerce maintains that it reviewed and analyzed comments received upon publication of its draft remand results. *See id.* at 12. For the *Final Results*, Commerce found that the amount of VAT Rima paid upon inputs exceeded the amount of VAT it collected from domestic customers. *See id.* Commerce found that "Rima had maintained a net VAT credit balance." *Id.* Thus, Commerce treated Rima's application of VAT credits towards input purchases as a recovery of VAT taxes paid. *See id.* at 13. Rima did not incur any net VAT costs because the VAT Rima paid exceeded the amount of VAT Rima collected, resulting in a VAT credit balance. *See id.* at 12-13. Under the Brazilian law in effect during the period of review, VAT credit bal-

ances could be used to purchase additional inputs. *See id.* at 14–15. Commerce found that “while Rima initially paid VAT amounts upon inputs, it fully recovered these amounts prior to exportation through the use of VAT credit as cash such that Rima did not actually incur any VAT during the [period of review].” *Id.* at 13. Accordingly, Commerce excluded VAT in determining the cost of materials component of CV.

3. Rima's Contentions

Rima generally agrees with Commerce that the Court should sustain the *Remand Redetermination*. *See* Rima's Resp. at 1–8. Taxes are remitted to the Brazilian government only when the amount of taxes collected by Rima from domestic customers is greater than the amount of taxes paid by Rima on inputs. *See id.* at 3–4. On the other hand, if the amount of VAT paid on inputs is greater than the amount collected from domestic customs, the balance is retained by Rima as a credit which may be used as cash to purchase inputs. *See id.* at 4. Rima asserts that the amount of VAT it paid on inputs exceeded the amount collected from domestic customers and, therefore, Rima accumulated VAT credits. *See id.* Rima used the VAT credits to pay its suppliers for certain inputs used to produce silicon metal. *See id.* Rima notes that it recovered all VAT paid for inputs prior to exportation. *See id.* at 7. Because Rima had recovered all of the VAT paid by the time of exportation, Rima asserts that “there were no taxes to be ‘remitted or refunded.’” *Id.* Rima asserts that “[r]ather than holding on to its VAT credits to be offset against future liabilities arising out of domestic market sales, Rima used VAT credits in lieu of cash to purchase inputs which were consumed in the production of the subject merchandise.” *Id.* Accordingly, Rima contends that VAT was not a cost of materials at the time of exportation and that Commerce properly excluded VAT from CV. *See id.*

B. Analysis

In determining normal value (“NV”), Commerce may disregard sales made at less than the cost of production. *See* 19 U.S.C. § 1677b(b)(1). If such sales are disregarded, the statute directs Commerce to base NV on the remaining sales of the foreign like product in the ordinary course of trade. *See id.* If, however, there are no sales made in the ordinary course of trade, Commerce is to base NV on the CV of the merchandise.³ *See id.* In calculating CV, the statute states

³The statute states that the CV is the amount equal to the sum of:

(1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business.

19 U.S.C. § 1677b(e).

that "the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are *remitted or refunded upon exportation of the subject merchandise* produced from such materials." See 19 U.S.C. § 1677b(e) (emphasis added). Plaintiffs argue that the plain language of the statute requires Commerce's calculation of CV to include the Brazilian VAT paid on inputs by Rima. See Plaintiffs' Comments at 9. In opposition, Commerce argues that the statute is ambiguous with respect to the treatment of internal taxes which are not remitted or refunded upon exportation of the subject merchandise. See Commerce's Resp. at 4. The Court finds that the plain language of the statute requires the inclusion of the VAT Rima paid upon inputs in the calculation of CV.

The CAFC has noted that "the Brazilian system of keeping a running total of taxes paid and collected and the 'settling up' monthly with the Brazilian government does not seem[sic] to meet the literal requirements of the statute in terms of refund and remittance." *Aimcor*, 141 F.3d at 1109 n.19. Commerce contends that it "is not required to ignore that the Brazilian tax system provides mechanisms for the recovery of taxes paid, and Commerce may account for that recovery to determine the correct value of taxes actually incurred for inclusion in calculating constructed value." Commerce's Resp. at 4. The statute directs Commerce to determine the cost of materials "without regard to any internal tax in the exporting country imposed on such materials. . . ." 19 U.S.C. § 1677b(e). The statute, however, directs Commerce to exclude internal taxes from the calculation of CV only when such taxes "are remitted or refunded upon exportation of the subject merchandise produced from such materials." *Id.*

Contrary to Commerce's contention, the plain language of the statute is unambiguous. The language of the statute precludes Commerce from including an internal tax in its calculation of CV when such a tax is remitted or refunded upon exportation. See *id.* When internal taxes are not refunded or remitted upon exportation of the subject merchandise, Commerce must include such internal taxes paid on inputs in its calculation of CV. See *Camargo*, 200 F.3d at 774. Here, the VAT Rima paid was not remitted or refunded upon exportation of the subject merchandise. RIMA's use of VAT credits to purchase inputs during the period of review does not constitute a remittance or refund upon exportation. See *Aimcor*, 141 F.3d at 1109 n.19. Commerce does not have the statutory authority to account for VAT which is remitted or refunded prior to or after exportation of the subject merchandise. The statute directs Commerce to account for the recovery of VAT which is remitted or refunded upon exportation.⁴

⁴Under Commerce's interpretation of the statute, Commerce would recognize and account for VAT recovered prior to exportation and not just VAT remitted or refunded upon exportation. Commerce asserts that Rima recovered VAT paid prior to exportation through

See 19 U.S.C. § 1677b(e). The plain language of the statute is clear on its face and requires Commerce to include the VAT Rima paid on inputs in CV. The Court finds Commerce's exclusion of the VAT Rima paid on inputs in the calculation of CV is not in accordance with law.

Conclusion

The Court finds that Commerce failed to follow this Court's remand instruction to include the VAT paid by Rima in the calculation of CV. Commerce has not provided a reasonable explanation for excluding the VAT Rima paid from the CV calculation. Commerce's contention that the language of 19 U.S.C. § 1677b(e) is ambiguous is unpersuasive. The plain language of the statute directs Commerce to include in the calculation of CV *any internal taxes paid that are not remitted or refunded upon exportation*. Here, the VAT paid by Rima on inputs *was not remitted or refunded upon exportation* of the subject merchandise. Rather, Rima recovered the VAT paid prior to exportation. Accordingly, Commerce improperly calculated CV by excluding the VAT paid by Rima on inputs from CV. This matter is again remanded to Commerce with instructions to include the VAT paid by Rima in its recalculation of CV and make all necessary adjustments to the dumping margin.

VAT credits which were used to purchase inputs during the period of review. See Remand Redetermination at 6. The statute, however, does not provide Commerce with the discretion to exclude from its CV calculation VAT refunded or remitted prior to or after exportation. If Commerce determines that it is necessary to account for VAT remitted or refunded prior to or even after exportation of the subject merchandise, then Commerce should seek redress through the legislative process.

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